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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-94

SCRANTON CONSTRUCTION COMPANY, INC. and CLEGG CONCRETE, INC.,

Petitioners,

versus

LITTON INDUSTRIES LEASING CORPORATION, LITTON SYSTEMS, INC., and UNITED CEMENT COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	4
Statement of the Case	6
Reasons for Granting the Writ	8
Jurisdictional Requirements	9
Litton-Ingalls Conspiracy	15
Vertical Conspiracy — Litton-United	16
Conclusion	17
Certificate of Service	18
Appendix A — Memorandum Opinion on Motions for Summary Judgment	1a
Appendix B — 5th Circuit Court of Appeals Opinion	76a
Appendix C — Judgment	86a
Appendix D — Letter from Clerk Wadsworth to all Counsel, dated 6-25-74	87a
Appendix E — Order Allowing Certiorari	89a

TABLE OF AUTHORITIES

Cases: Page

Aluminum Company of America v. Tandet, D. Conn., 1964, 235 F.Supp. 111 13

American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 at 924 (5th Cir., 1951) 13

Jones v. Metzger Dairies, Inc., (5th Cir., 1964) 334 F.2d 919 at 924 13

Kroger v. FTC, 438 F.2d 1372 (1971) (C.A. 6th Cir.) cert. den., 505 U.S. 671 (1971) 11, 13

In re Western Liquid Asphalt Cases, 487 F.2d 202, (9th Cir., 1973), cert. granted, ____ U.S. ____, 94 S.Ct. 1586, ____ L.Ed.2d ____ (1974) 9

Littlejohn v. Shell Oil Company, 483 F.2d 1140, 1145 (5th Cir., 1973), cert. den., ____ U.S. ____, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973) 9, 10

Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir., 1973), cert. den., ____ U.S. ____, 94 S.Ct. 899, 39 L. Ed.2d 102 (1974) 10

Perkins v. Standard Oil Co. of California, 395 U.S. 642, 23 L.Ed.2d 599, 89 S.Ct. 1871 (1969) reh. den. 396 U.S. 871 (1969) 14

Rangen, Inc. v. Sterling Nelson & Sons, Inc., (1965) 351 F.2d 851, cert. den. 86 S.Ct. 1967, 383 U.S. 936, 15 L.Ed.2d 853 10

Stough, et al v. May and Company of Georgia, Inc., et al, 484 F.2d 22 (5th Cir., 1973) 13

TABLE OF AUTHORITIES (Continued)

Page

Statutes:

Clayton Act §2(a) as amended by the Robinson-Patman Act, 14 U.S.C. §13(a) 5, 17

Clayton Act, §2(f), as amended, 15 U.S.C. §13(f) 5

Clayton Act §3 (15 U.S.C.A. §14) 4, 8, 15

Clayton Act §4 (15 U.S.C.A. §15) 2

Sherman Act §1, 15 U.S.C. §1 ..... 4, 8, 16

15 U.S.C.A. §13(a)(f) 3, 4, 8, 11

28 U.S.C.A. §1254(1) 2

28 U.S.C. 1292 (b) 2

28 U.S.C.A. §1337 2

United States Constitution Art. 1, Sec. 8, Clause 3 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

SCRANTON CONSTRUCTION COMPANY, INC.
Petitioners,

versus

LITTON INDUSTRIES LEASING CORPORATION, LITTON SYSTEMS, INC., and UNITED CEMENT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Scranton Construction Company, Inc., and Clegg Concrete, Inc., Mississippi and Louisiana corporations, respectively, petition for Writ of Certiorari to review the opinion of the Court of Appeals for the Fifth Circuit, which affirmed a decision by District Judge Walter L. Nixon, Jr., Southern District of Mississippi, holding that jurisdiction under the Sherman Act obtained, but that Petitioners could prove no conspiracy, and that jurisdiction under the Robinson-Patman Act was absent. The District Court granted Summary Judgment for all Defendants, and the Court of Appeals affirmed.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, Biloxi Division, entered on February 16, 1973, is not reported. The panel opinion of the United States Court of Appeals, Fifth Circuit, entered on May 31, 1974, is reported at 494 F. 2d 778, Petition for Rehearing *En Banc*, denied on June 25, 1974, ____ F. 2d ____. All opinions are included in Appendices.

JURISDICTION

The District Court's jurisdiction was found lacking, but was based on the Clayton Act §4 (15 USCA §15) and 28 USCA §1337. The Court of Appeals based jurisdiction on 28 USC 1292 (b).

This petition is filed within the time permitted by law. The jurisdiction of the Supreme Court is based on 28 USCA §1254 (1).

QUESTIONS PRESENTED

1. With respect to a commodity produced by physical mixing under controlled conditions in one state, where substantially all ingredients travel interstate prior to mixing, does the fact that one supplier is a Louisiana contractor and his competitor is a Mississippi contractor and that it is used in an instrumentality of commerce such as the largest modern shipyard in the United States doing much defense contracting supply the necessary requirements, by themselves and

as a matter of law, of the anti-discrimination clause of the Robinson-Patman Act that the sale be by a 'person engaged in commerce, in the course of such commerce', that '*either or any of the purchases involved* * * * be in commerce', and that the 'effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce'? [Emphasis ours]

This question arises in this case under 15 USCA §13 (f) which forbids a buyer or "any person engaged in commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section", and also embraces interstate movement of commodity across state lines as an ingredient.

2. Are two consummated sales necessary to establish "discrimination" within the meaning of 15 USCA §13 (a) (f), where a common *sole source* seller "quotes" separate prices to competing buyers, on an ingredient", where buyers are bidding on a large supply contract, where they are the only bidders in contention, where the seller has pre-empted his competition by agreement with customer of buyers that no other seller shall be considered by the bidding buyers at the direction of their customer, who is a mammoth buyer not in competition with the aforesaid buyers?

3. Is a single contract for sale of an "ingredient" not consummated, but under circumstances indicating "discrimination" under the aforesaid Acts sufficient to satisfy subject matter jurisdictional requirements?

4. Is a single sale of large volume of a finished commodity resulting from a bidding situation sufficient to satisfy the jurisdictional or "standing" requirements of 15 USCA §13 (f), where the commodity is consumed and not resold, manufactured by interstate temporary equipment using interstate ingredients?

5. Did the Court of Appeals apply a proper standard of proof in ruling that no conspiracy could be shown under any circumstances, and does a mammoth buyer's "requirements conditions" which prevent interstate "competition" satisfy the jurisdictional requirements of §3 of the Clayton Act, 15 USC §14, where the commodity is as was identified in Question 1?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Art. 1, Sec. 8, Clause 3:

> The Congress shall have power ..... to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.....

Sherman Act §1, 15 USCA §1, in pertinent part:

> Every contract, combination .... or conspiracy in restraint of trade or commerce .... is ... illegal.....

Clayton Act, Section 2(a) as amended by the Robinson-Patman Act, 14 USC §13(a), in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them* . . . (Emphasis added)

Clayton Act, Section 2(f), as amended, 15 USC §13(f) in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this action.

STATEMENT OF THE CASE

This case evolves out of Litton's agreement with the State of Mississippi whereby $130,000,000.00 was provided to Litton for construction of a shipyard in Pascagoula, Mississippi, where much national defense contracting is done. Mississippi provided the money by issuing its bonds and entered into a lease agreement with Litton through its subsidiary, Ingalls Shipbuilding Corporation, whereby Litton could lease the premises for a term of years and then either buy or be released leaving Mississippi as owner. To date, it is still leased.

During construction, Litton called for bids through Ralph M. Parsons Company, its subcontractor, on 300,000 cubic yards of concrete. Petitioners here, Clegg Concrete, Inc., of Baton Rouge, Louisiana, and Scranton Construction Company, Inc., of Pascagoula, Mississippi, entered the bidding against Concrete Products, Inc. [Hollister] and Weatherby Materials, Inc. [Weatherby] both joint ventures by small corporations.

After much rebidding, a situation resulted wherein Petitioners were lowest and best at $11.67/cu. yd., while competitors were at $12.10/cu. yd. Prior to this time, Petitioners had chosen Louisiana Cement and competitors had chosen Ideal Cement. It was at this time that United was "introduced" during the nocturnal hours 10:00 P.M. or so, on Litton's premises in Pascagoula, and United's representative was "allowed" to "quote" a "special" price to each bidding joint

venture. Both did not want to use United, but assumed it was necessary to satisfy Litton under the circumstances. Meeting each bidder separately, United's representative claims to have "met the competition".

Litton's Vice President ordered this done and agreed to allow United's representative on the premises for such purposes. He gave a price of $3.37/bbl. to Petitioners, who state on oath that this did not meet their price from Louisiana Cement; he gave $3.01 to competitors, and this did not meet their price from Ideal, stated on oath to be $2.92/bbl.

The next morning Litton's Vice President called competitors into a closed room and represented Petitioners' bid to be $11.62/cu. yd., when it was, in fact, $11.67/cu. yd., and competitors responded with $11.61/cu. yd. Litton required each bidder to sell to Ingalls at the same price. Petitioners refused.

Eventually competitors refused to use United because it took many more barrels of United to produce the same amount of concrete produced by Ideal's cement. United sued competitors for specific performance and damages, then abandoned the suit. Competitors bought from Ideal.

Petitioners brought this suit alleging violations of the Sherman and Robinson-Patman Acts. The lower courts have dismissed all claims on Motion for Summary Judgment.

Petitioners' case embodied the following charges:

1. That Litton/Ingalls unlawfully depressed and fixed a price on concrete under 15 USCA §1.

2. That Litton and competitors agreed not to use Petitioners' concrete for mutually advantageous economic reasons. [Petitioners refused to furnish concrete to Ingalls at same low price] violating 15 USCA §14 (Appellants seek to amend so as to charge a violation of 15 USCA §1)

3. That Litton/United vertically agreed to oust all other cement suppliers allowing United to quote a differential cement price. [Litton had the right to purchase cement and furnish to both bidders, but United pressed Litton to abandon it] violating the Sherman Act.

4. That United's price difference violated 15 USCA §13(a).

5. That Litton's inducement of $11.61 violated 15 USCA §13(f), Appellants contending that no violation of 13(a) need occur to state the cause of action.

REASONS FOR GRANTING THE WRIT

The Court must resolve the questions presented in order to make uniform the lowest common denominators of jurisdiction and standing, not as yet very clear in our whole body of case law, and to correctly deter-

mine the standard of proof required of Plaintiff on Motion for Summary Judgment on the merits.

JURISDICTIONAL REQUIREMENTS

1. The threshold question presented (#1, *Supra)* invokes the holding in *Copp Paving*,[1] now pending before this Court, where the Ninth Circuit distinguished *Littlejohn, infra,* on the grounds that there the Fifth Circuit was not called upon to decide the import of a close nexus with an instrumentality of interstate commerce. Here approximately 300,000 cubic yards of concrete were delivered to Litton's West Bank facility in Pascagoula, Mississippi, exclusive of a substantial amount delivered to its wholly owned subsidiary on the East Bank, Ingalls.

The *Littlejohn*[2] case showed a closely divided Court on the issue of intrastate sales being made a basis for Robinson-Patman Act jurisdiction. The dispositive facts in *Littlejohn* were not coincident here, but those of *Copp Paving*[3] possibly are.

Petitioners' direct level competitors, not a party here beat and did not meet the supposed competing

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[1] *In re Western Liquid Asphalt Cases*, 487 F. 2d 202, (9th Cir., 1973), cert. granted, ____ U.S. ____, 94 S. Ct. 1586, ____ L. Ed. 2d ____ (1974)

[2] *Littlejohn v. Shell Oil Co.*, 483 F. 2d 1140, 1145 (5th Cir., 1973), cert. den., ____ U.S. ____, 94 S. Ct. 849, 38 L. Ed. 2d 743 (1973)

[3] Supra fn. 1.

bid of Petitioners' represented to be $11.62 in response to Litton's invitation to "beat that". This produced a primary level injury which apparently has greater jurisdictional latitude under *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F. 2d 763 (7th Cir. 1973) cert. den., ____ U.S. ____, 94 S. Ct. 899, 39 L. Ed. 2d 102 (1974), because of the pattern of growth for Petitioners' competitors. It is not disputed that competitors made sales across state lines into Alabama.

Clegg, Petitioner, a Louisiana contractor, supplied concrete in joint-venture with Scranton, a Mississippi corporation in this bidding. None was ever produced, but the depositions offered by Appellants show conclusively that 1) Clegg was the concrete "know-how" man from Baton Rouge, Louisiana; 2) his cement would be sent into Mississippi from Louisiana, his laborers and equipment were to travel interstate to the job site in Mississippi; 3) and that only the utilization of ready-mix "know-how" and physical mixing processes occurred in Mississippi. Notwithstanding, the Court of Appeals and District Court held this concrete production in Pascagoula with delivery to Litton there did not satisfy the "in commerce" requirement. Most importantly, the *competition* between Appellants and their competitors was *interstate*. To be added to this is the nexus between the concrete sale to a massive instrumentality of interstate commerce, Litton's $130,000,000.00 shipyard. Contrary to *Littlejohn, En Banc*, on these issues, see *Rangen, Inc. v. Sterling Nelson & Sons, Inc.* (1965) 351 F. 2d 851, *Cert. den.* 86 S. Ct. 1967, 383 U.S. 936, 15 L. Ed. 2d 853

2. Taking as a text, *Kroger v. FTC*, 438 F. 2d 1372 (1971) (C.A. 6th Cir.) cert. den., 505 U.S. 671 (1971), there need not be a violation of 2(a) of the Act in order for a buyer to be liable under 2(f), where the buyer is guilty of fraud and misrepresentation inducing an artificially low price. If this is the law, then there can be no "two sale" requirement as under 2(a) applicable to 2(f) charges here. There was only one sale of concrete to Litton, excluding the tied sales to its subsidiary, Ingalls.

3. Since Petitioners sued United Cement for violation of 2(a) of the Act, the question of secondary level injury is presented embracing the "two-sale" discrimination rule, subject matter jurisdiction, and standing. It seems clear that these last two requirements are met, but that the first is found to be lacking by the opinion of the Fifth Circuit, since the question was never reached.

Count 1, Paragraph XV of the Second Amended Complaint alleges that United quoted a price differential to competing bidders, under circumstances amounting to a violation of 15 USCA, §13(a), §2(a) of the Robinson-Patman Act.[1] The crucial points are "dis-

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[1]Count 1, Par. XV, Second Amended Complaint. Complainants specifically charge that United Cement is in violation of 15 USCA, Section 13(a), by giving on or about May 8, 1968, a higher price of cement to the Complainant Joint-Venture in the competitive bidding on a public contract in Pascagoula, Mississippi, inasmuch as United Cement, by and through its agent, Jack Reese, knew or should have known that the effect of quoting a price of $3.37 net for a barrel of cement to the Complainants and by quoting a price of $3.01 net per barrel to the

crimination", *vel non*, and to a lesser degree, good faith as a defense.[2]

United contracted to sell several hundred thousand barrels of cement to competitors at $3.01/bbl., and when competitors failed to honor the sale, filed a sworn complaint for damages and specific performance in State Court, all a part of the record below, and then abandoned the suit for reasons not clearly established.

Since United was "quoting" to two bidders, there could only be "one sale", but there was meaningful discrimination. The Act itself required "discrimination" only, *"where either or any of the purchases in-*

Complainants' competitors, Hollister and Weatherby, would have the net effect of placing the Complainant Joint-Venturer in a disadvantageous position, inasmuch as the Complainant Joint-Venturer would have been able to substantially lessen its bid had it been afforded the privilege of the $3.01 per barrel price insead of the 3.37 per barrel price of cement, the $3.37 per barrel being the price that was given to your Complainants' competitors, Hollister and Weatherby, by said Jack Reese; that said prices per barrel were for identical cement of like grade and quality, and that said cement was in commerce and was shipped from Texas or Oklahoma, and further that these actions substantially lessened the competitive position of Complainants, and that sales to competitors of Complainants were accomplished and that the cement was in interstate commerce and that the price quotes were not in good faith.

[2]The question of good faith is not discussed here, but Jack Reese and one J. R. Scribner, a member of the Mississippi A & I Board were both stockholders in Better Roads, Inc., a service company for United. Prior to the bidding Scribner, a factory representative for a ready-mix machine supplier contracted to sell a $130,000.00 plant to competitors, if they got the bid.

volved in such discrimination are in commerce."[1] The Court of Appeals has not resolved this point. *Stough, et al v. May and Company of Georgia, Inc., et al,* 484 F. 2d 22 (5th Cir., 1973), citing *Jones v. Metzger Dairies, Inc.* (5th Cir., 1964), 334 F. 2d 919 at 924. [cf. *Aluminum Company of America v Tandet,* D. Conn., 1964, 235 F. Supp. 111] holds that "we pretermit ruling on the 'consummated sales' approach of the District Court".

Petitioners urge that this point be resolved, and that discrimination *vel non* should be a jury question, especially where good faith is in doubt as is certainly the case where a cement supplier pre-empts all his competition by agreement with a mammoth buyer such as Litton.[2] Two sales are implied in bidding.[3]

4. Without dispute, there was only one sale of concrete, excluding the tied sales to Ingalls and those in Alabama. Under some authority, a violation of 2(a), requiring "two sales" is necessary to a valid 2(f) charge. *Kroger v. FTC* (Supra) holds contra, but is

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[1]The cement was shipped from Texas.

[2]United contends it was only meeting competition, but the facts are conflicting. Cf. *American Can Co. v. Bruce's Juices, Inc.,* 187 F. 2d 919 at 924 (5th Cir. 1951) holding that a *competing* purchaser need not purchase at a discriminatory price if the failure is attributable to Defendant's own discriminatory practice.

[3]Also, there is no dispute that Litton's President, Ellis Gardner, tried to get Reese (United's sales representative) to give $3.01 to both bidders under Litton's contractual right to lift out the ingredients and furnish them to concrete bidders, but Reese refused. Litton had already given both bidders' cement prices to United. Litton inextricably placed the concrete "in commerce" by such agreement with United's interstate cement.

not explicit on the test for "discrimination" or standing.

Perkins v. Standard Oil Co. of California, 395 U.S. 642, 23 L. Ed. 2d 599, 89 S. Ct. 1871 (1969), reh. den. 396 U.S. 871 (1969) authorizes standing to nearly *any* level of competition where the jury may find injury proximately caused by the alleged violation.

5. Although disputed, competitors of Petitioners testified that Litton's Vice President induced from them an artificially low bid of $11.61 by misrepresenting Petitioners' bid of $11.67 as being $11.62. The Court of Appeals found that the "gulled competitor" was not a party to a conspiracy to eliminate Petitioners, although they accepted this "secret" misrepresentation from the competition. The basis for this finding was that Litton acted unilaterally.

Petitioner strongly urges that this is a question of fact which the jury should decide. Under traditional notions of conspiracy, it would seem that competitors knew or should have known that such "back-room" hand notes were not legal, and that they ,in fact, were agreeing on a price with Litton; Litton was "fixing" a depressed price by fraud, and competitors were eliminating the Petitioners. That this agreement was to the economic advantage of both Litton and Petitioners' competitors should suffice to constitute a conspiracy. The Court of Appeals stated that this was "plainly unilateral", and this, in the face of a two-party, mutually advantageous deal. Petitioners respectfully disagree and urge that the same constitutes

a jury question, even though the "gulled competitor" may not have been aware of Litton's fraud at the time the deal was made.

The Court of Appeals could not find any allegations of this conspiracy, but they are contained in the Second Amended Complaint.[1]

This charge of conspiracy is misplaced under Paragraph XV of the Second Amended Complaint which relates to the Clayton and Robinson-Patman Acts, and should be charged as a violation of Section 1 of the Sherman Act. Even so, Petitioners urge that the record makes a jury question on the charge under 15 USCA and Section 14, and if an opportunity to write briefs is accorded, these charges will be documented.

The fact that competitors were not named Defendant should make no difference. They were not named because of the difficulty of proof.

LITTON — INGALLS CONSPIRACY

This count is erroneously entitled "Tying Agreement", and should be entitled "price-fixing" or "Intra-

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[1]Count #4, Par. XV, Second Amended Complaint entitled (Sale on *Agreement* not to use concrete of Competitor); Complainants specifically charge that Litton, by giving the price of $11.62 to Weatherby-Hollister, entered into an *agreement* not to use Complainants' concrete, once Weatherby-Hollister responded with the $11.61 bid, a violation of 15 USCA, Sec. 14, Clayton Act, Sections 3-4.

Corporate" conspiracy.[1] Count 3 also alleges that Litton wholly owns Ingalls. The case law is clear that a wholly owned subsidiary may conspire with its parent. It is undisputed that Litton and Ingalls agreed to "give them (bidders) the opportunity" to so furnish concrete. Both bidders testified that this was a condition precedent. If so, Petitioners urge that the Court of Appeals erred in not allowing this charge to go to the jury.

VERTICAL CONSPIRACY — LITTON-UNITED

The Second Amended Complaint charges that Litton and United Cement conspired to eliminate Petitioners by agreement mutually advantageous to both.[2] Implicit in this charge is the price differential quoted by United to Petitioners and competitors, the same being $3.37/bbl. cement to Petitioners, and $3.01/bbl. to

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[1]Count 3, Par. XIV, Second Amended Complaint; Complainants specifically charge that Litton (West Bank) and Ingalls (East Bank) agreed, expressly or impliedly to use their monopoly power to force and coerce — [joint-venture] — to furnish concrete to the East Bank at the same low price, $11.61, ... and that the same placed an undue burden on interstate trade.

[2]Count 4, Par. XIV Second Amended Complaint: Complainants specifically charge that the agreement between Ellis Gardner, for Litton, and Jack Reese, for United. . . , whereby Litton agreed to award the cement contract to said United. . . , if United would "consider" using Rust Engineering, a subsidiary of Litton, in building United's proposed cement plant in North Mississippi . . . was an agreement in restraint of interstate trade, in violation, per se, of 15 USCA Section 1.

competitors, with only one-half the total volume requirement being sold to competitors and total requirement being sold to Petitioners. (Approximately 400,000 barrels total) The price differential charge is contained in Count 1, Paragraph XV of the Complaint under the Robinson-Patman Act, Section 2(a).

Although the Court of Appeals failed to mention it, United's agreement with Litton did away with all cement competition, and this seems to support the charge of conspiracy, and leave open the question of standing to sue only. It is respectfully urged that the Court of Appeals erred in failing to remand for a jury trial on this issue.

CONCLUSION

Although not argued in this Petition, the congressional history of the anti-trust laws does not indicate such a complex set of rules for jurisdiction to be necessary. The Robinson-Patman Act requires "involvement" in commerce only. It also speaks of "discrimination" rather than "two sales". Even so, in bidding where arrangements are made by a supplier to sell ingredients in *any* event, are not "two sales" implied? How else could the preconceived plan operate?

This case should be reversed on jurisdictional grounds and the voluminous testimony's inferences

should be decided by a jury in accordance with the 7th Amendment.

Respectfully submitted at Gulfport, Mississippi, this 7th day of August, 1974, A.D.

BRELAND AND BARNETT
Attorneys for Petitioners

Norman Breland
OF COUNSEL

CERTIFICATE OF SERVICE

I, NORMAN BRELAND, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on Counsel for the Respondents, by depositing the same in the U.S. Mails, postage prepaid, on the 7th day of August, 1974, addressed to Honorable Charles Foster, 360 North Crescent Drive, Beverly Hills, CA 90213; Honorable Karl Weisenberg, P.O. Box 26, Pascagoula, MS 39567; and to Honorable W. Timothy Jones, P. O. Box 119, Jackson, MS 39205.

NORMAN BRELAND

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 4166(N)

SCRANTON CONSTRUCTION COMPANY, INC. and CLEGG CONCRETE, INC.

Plaintiffs,

versus

LITTON INDUSTRIES LEASING CORPORATION, LITTON SYSTEMS, INC., RALPH M. PARSONS COMPANY, INC. AND UNITED CEMENT COMPANY, INC.

Defendants.

MEMORANDUM OPINION ON MOTIONS FOR SUMMARY JUDGMENT

Filed: Feb. 16, 1973

This private treble damage antitrust and common law action was filed by Scranton Construction Company, Inc., (formerly W & A Construction Company, Inc.),[1] a Mississippi corporation and Clegg Concrete,

[1]At all pertinent times the plaintiff, Scranton, was W & A Construction Co., Inc. which changed its name by amendment of March 2, 1970.

Inc., a Louisiana corporation, who at all relevant times were acting as joint venturers, against Litton Industries Leasing Corporation,[2] and Litton Systems, Inc. (hereinafter collectively referred to as "Litton"), a Delaware corporation with its principal offices in California, Ralph M. Parsons Co., Inc., a Nevada corporation qualified to do business in Mississippi, and United Cement Co., Inc., a Mississippi corporation. In their second Amended Complaint filed herein on November 3, 1971, plaintiffs seek triple damages and attorney's fees against the defendants pursuant to 15 U.S.C.A. §15, alleging in several counts various violations of the Sherman Antitrust Act and the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act. Also, plaintiffs seek damages and penalties under the Mississippi Antitrust laws, Mississippi Code of 1942, Rec., §§1088, 1089, et seq. In addition to their antitrust claims, the plaintiffs seek to recover damages against the defendants on the basis of fraud and estoppel.

The plaintiffs contend that this Court has jurisdiction of this case based upon 15 U.S.C. §§4 and 15; Mississippi Code of 1942, Rec. §§1088 and 1089 (apparently mistated as 1099); and 28 U.S.C.A. §§1331(a) and 1337. It is further alleged that there is complete diversity of citizenship between all plaintiffs and all defendants.

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[2]This defendant apparently is inappropriately joined as it is a wholly owned subsidiary of Litton Industries, Inc., formed and operated for the purpose of owning certain vessels leased to Sealand Services, Inc. and was not involved in the construction of Ingalls LAMP Shipyard out of which this controversy arose. See Gardner Dep., pp. 36-37.

All of the defendants have filed their separate motions for Summary Judgment based upon the pleadings, depositions and affidavits and supporting memoranda briefs. The plaintiffs have also submitted their Memorandum Brief in Opposition to the Defendants' Motions as well as a Memorandum Brief in Support of their Causes of Action.

Prior to discussing the specific grounds for the Summary Judgment motions of the three defendants and in order to fully understand the bases therefor, it is necessary to relate the factual background of this litigation which grows out of the plaintiffs' unsuccessful joint venture effort to obtain a subcontract to furnish ready-mix concrete for use in construction of a shipyard known as the Litton Advanced Marine Production Facility ("LAMP Facility"), also known as Ingalls West or "The Shipyard of the Future" in Pascagoula, Mssissippi.

On December 7, 1967, the State of Mississippi, by and through the Mississippi Agricultural and Industrial Board (A & I Board) and the Ingalls Shipbuilding Corporation, a wholly owned subsidiary of the defendant Litton, entered into a construction contract in which Ingalls agreed to construct the above shipyard facilities for the State at Pascagoula, Mississippi, to be financed by a $130,000,000 Mississippi bond issue. Litton also entered into this contract as guarantor, acknowledging that it wholly owned Ingalls, and under the contract, it undertook to install extensive shipbuilding facilities, necessitating the use of large amounts of concrete to be provided through subcontractors,

which it reserved the right to employ in connection with the shipyard construction.

Thereafter on January 8, 1968, Litton/Ingalls by agreement dated January 8, 1968, employed the co-defendant, Ralph M. Parsons, Inc. (Parsons) as its "general contractor or subcontractor" to perform certain work in connection with the construction of the shipyard facilities for a fixed fee. Under the terms of this contract between Litton/Ingalls and Parsons, Litton reserved complete control of the decision-making power as to both the award and method of the award of all major subcontracts which included the supply of the ready-mix concrete in question.[3]

Articles 10 and 11 of the contract between the State and Ingalls provided that insofar as practicable, Ingalls shall give preference to the use of materials, products and equipment made in Mississippi, considering price, quality and time of delivery, and that simi-

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[3]Paragraphs (b) and (c) of Article XXIX of the Construction Contract (Exhibit A to Exhibit 1 - the Affidavit of Jack T. Calhoun - to Parsons' Motion for Summary Judgment) expressly provide:

> "(b) Contractor shall not enter into any subcontracts hereunder or into any contracts for the purchase of materials, supplies, equipment or equipment rentals, in any amount in excess of $10,000 without the prior written approval of Ingalls.
>
> "(c) All subcontracts and purchase orders for materials and equipment to be supplied directly to the job shall be fixed price and shall be awarded on the basis of competitive bidding to the lowest acceptable bidder unless otherwise required by or agreed to by Ingalls."

lar preference provisions should be included by Ingalls in all of its subcontracts awarded. Article 11 further provided that Ingalls shall give notice by publication of its intent to let or negotiate any subcontracts so that all Mississippi contractors would have an opportunity to submit bids thereon.

Construction of the shipyard facilities called for the supply of a substantial amount of ready-mix concrete. Consequently, in March, 1968, Parsons had notice published in several Mississippi newspapers that it would receive sealed bids on April 22, 1968 for an estimated 300,000 cubic yards of ready-mix concrete to be delivered to the construction site, and that the requisites for quotations for the furnishing of this concrete would be available on April 5, 1968. The notice provided that "The Ralph M. Parsons Company hereby reserves the right to reject any and all bids." The request for quotations did not specify the total amount of ready-mix concrete required but asked for alternative bids on the following quantities: (a) up to 249,999 cubic yards; (b) up to 299,999 cubic yards; and (c) up to 350,000 cubic yards. On the face of the request for quotations was the following language: "The right is reserved to reject any and or all bids." The following language also appeared in the quotation request:

> "Purchaser retains the right to furnish to successful Bidder Cement, Sand and/or Aggregate if to do so is for the best interest of Ingalls LAMP Shipyard, The Ralph M. Parsons Company and the State of Mississippi."

Attached to the request for quotations was an estimated delivery schedule setting out the estimated monthly quantities of ready-mix concrete to be delivered to the construction site. On the date of the preparation of the request, the estimates made by Parsons and approved by Litton were based upon a preliminary engineering design then in progress. The actual engineering estimate was about 245,000 cubic yards of concrete.

Thereafter, bids on supply of the ready-mix concrete were submitted on there separate occasions. The original group of bids, submitted by numerous suppliers, was opened on April 23, 1968 and referred to the three member "Bid Evaluation Committee", consisting of Jack T. Calhoun, Parsons Project Manager of Procurement for the LAMP Facility, who was assigned, and performed, the task of dealing for Parsons with Litton/Ingalls for the issuance of subcontracts and purchase orders incident to the construction of the facility, and two representatives of Litton/Ingalls, Robert Stewart Merritt and Russell A. Clough.

The committee evaluated the bids, determined that the plaintiffs' joint venture had submitted the lowest bid, that they were qualified, and consequently recommended to Litton/Ingalls' management that they be awarded the contract. However, H. W. McCollum, representing the management of Litton/Ingalls, directed the committee to secure rebidding by plaintiffs and Hollister and Weathersby (H & W), the second lowest bidder. The second bids from plaintiffs and H & W were submitted on April 30, 1968. Again, the Bid Evalu-

ation Committee evaluated the bids, found plaintiffs' to be low, and unanimously recommended to Litton/-Ingalls' management that they be awarded the contract. On neither the first nor the second bids was H & W within 5% of plaintiffs' low bid.[4]

After the second bid, McCollum again exercised the power reserved to Litton/Ingalls under the Ingalls-Parsons agreement and directed that plaintiffs and H & W, the two low bidders, meet separately with Mr. Jack Reese, Vice-President and General Manager of the defendant, United Cement Company (United), so that Reese could quote both "a special low price on cement which might enable the bidders to further reduce their bid." These meetings with Reese were arranged by McCollum at the request of Ellis Gardner, President of Ingalls, so that United would have a "fair shot" at the cement contract and in return for which Reese promised Gardner that Rust Engineering,

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[4]Plaintiffs contend that since the plaintiff, Clegg, a joint venturer with W & A (now Scranton) was a foreign Louisiana corporation, plaintiffs were penalized by being subjected to the preference provision of §8968-11, Miss. Code of 1942, now repealed, which provided in part, on May 8, 1968:

> "In the letting of public contracts, preference shall be given to resident contractors. If a non-resident contractor shall be the lowest and best bidder, but the bid of a resident contractor shall come within five per cent (5%) of the bid of such non-resident contractor, and such resident contractor shall be willing to accept such contract at the same low price bid by the non-resident contractor, then the contract shall be awarded to the resident contractor, provided, however, that he shall nevertheless be required to make bond as provided by law. . . ."

a wholly owned subsidiary of Litton would have a "fair shot" at building and/or designing United's proposed cement plant in Northeast Mississippi, and also because of information previously furnished by Reese concerning an alleged "rakedown" or "kickback" scheme being followed by some of Ingalls' officials in connection with the supplying of cement for this job in question. This exposure by Reese led to the discharge of those involved. United desired to build a cement manufacturing plant in Northeast Mississippi, and this was consistent with the Mississippi preference provision in Litton's contract with the State.

Reese met separately with representatives of each of the two ready-mix concrete bidders, plaintiffs and H & W, and on advice of counsel, quoted a cement price of $3.01 net per barrel to H & W which met the same low price quotation which H & W had from Ideal Cement Company, and $3.47 net per barrel to plaintiffs which met the same low price quotation which plaintiff had from Louisiana Cement Company, despite the fact that Ingalls' President, Gardner, requested United, through Reese, to cross-reference the $3.01 per barrel price and thus make it available to plaintiffs and H & W or to quote this price directly to Ingalls for Parsons, which he refused to do, being advised by his attorneys that this would change the competitive status of the two bidders and thus violate the Federal antitrust laws. Neither of the ready-mix bidders had the other's cement price. Plaintiffs agreed to buy all of their required cement from United at the quoted price if they were awarded the contract, and H & W agreed

to buy half their needed cement from United in the event they received the award.

On May 8, 1968, plaintiffs submitted their third sealed bid of $11.67 per cubic yard of ready-mix concrete which was the lowest and best bid; however, on the morning of May 9, 1969, McCollum handed to one of H & W's owners a piece of paper with the price of "$11.62" written thereon which indicated to him that this was the plaintiffs' bid and that a lower bid would have to be submitted by H & W in order to receive the contract. Consequently, H & W bid $11.61 per cubic yard and was awarded the subcontract and they and plaintiffs were so notified. Plaintiffs contacted Litton and requested the opportunity to submit a revised bid but were informed that the award was final and the decision would not be retracted. On or about May 10, 1968, the H & W venture and Parsons jointly executed a purchase order for the ready-mix concrete. Thereafter, Litton and Parsons were informed by H & W that United's cement would not be purchased and that all of the required cement would be supplied by Ideal Cement Company. Ideal furnished H & W the necessary cement for the performance of the subcontract with the consent of Litton/Parsons, for $2.92 net per barrel.[5]

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[5]United later filed suit against H & W for breach of contract based on its refusal to purchase one-half of its cement requirement from United which it had agreed to do in the event it was awarded the subcontract. This suit was dismissed by United with the express proviso that while H & W was not binding itself to purchase any cement in the future from United, that it would consider doing so. It did in fact subsequently purchase some cement for another job from United

Although the plaintiffs were unsuccessful in obtaining this subcontract, Scranton (then W & A Construction Co.), in joint venture with Ceafco, Inc., did obtain a subsequent contract for steel erection at the Ingalls LAMP Shipyard. Those joint venturers sued Ingalls in the Chancery Court of Jackson County, Mississippi in December, 1969 for breach of that contract and that case was removed to this Court where it is presently pending. Efforts were made to settle that suit, and Ernest Applewhite, President of the plaintiff, Scranton, acknowledged in his deposition that the action sub judice might not have been filed if the above breach of contract action had been settled. (Applewhite Dep., pp. 379-381).

Before filing this suit, plaintiffs requested United to join with them in an antitrust action against Litton and Parsons which it declined to do. This action was then filed naming United a defendant together with Litton and Parsons. (Reese Dep., pp. 57-58).

In their second Amended Complaint filed herein, the plaintiffs, in addition to charging the defendants with violating the Mississippi antitrust laws and with common law fraud, also allege in the five counts of Paragraph XIV, violation of the Sherman Antitrust Act, 15 U.S.C.A., §§1 and 2. More specifically, they contend that all defendants conspired and/or attempted

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at the then prevailing market price for cement in the Pascagoula area, namely, $3.67 net per barrel (See page 2 of Hollister's Affidavit, Ex. "B" to United's Motion for Summary Judgment).

to conspire to unlawfully eliminate plaintiffs from competition by express or implied agreement, tending to create a monopoly in the ready-mix concrete business in the Pascagoula, Mississippi area and otherwise unduly restraining interstate trade and eliminating plaintiffs from free access to the market; that Litton, with the knowledge or consent of the other defendants pegged, depressed and stabilized the price of ready-mix concrete in Pascagoula by misrepresenting to H & W that plaintiffs had bid $11.62 per cubic yard, intentionally causing a low overall price on ready-mix concrete cost on the project in question and on Ingalls' "East Bank" shipyard project owned by Litton, which also required a ready-mix concrete supply; that Litton (West Bank) and Ingalls (East Bank) expressly or impliedly agreed to use their monopoly power to coerce H & W to furnish concrete to the East Bank shipyard at the $11.61 price which was being charged for concrete on the project in question (West Bank), and which constitutes a "tying arrangement" prohibited by the Sherman Act; that Litton and United agreed that United would "consider" permitting Rust Engineering, a subsidiary of Litton, to have a "fair shot" or "final opportunity" to quote cement prices to plaintiff and H & W, which constituted an agreement in restraint of interstate trade; and that United, which was designated by all defendants acting in concert as the sole-source supplier of cement to plaintiffs and H & W, by quoting the higher price for cement to plaintiffs and to H & W was guilty of an unlawful refusal to deal, thus denying to plaintiffs meaningful access to the market.

In the five counts of Paragraph XV of their second Amended Complaint plaintiffs contend that United violated various provisions of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C.A., Secs. 13-15.

Specifically, plaintiffs charge in Count 1 that United violated Sec. 13(a)[6] by giving on May 8, 1968, a higher cement price to plaintiff's competitor, H & W, than to plaintiff, which was not done in good faith and which substantially lessened plaintiffs' competitive position; in Count 2, that Litton and United violated 15 U.S.C.A., Sec. 13(e)[7] by acting in concert to make United's cement available to plaintiffs and their competitors on terms which were not proportionately equal and under

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[6] 15 U.S.C.A. Sec. 13(a) provides in pertinent part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale. . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

[7] 15 U.S.C.A. Sec. 13(e) provides: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionately equal terms".

conditions that led plaintiffs to reasonably believe they were required to use United cement at $3.37 per barrel at a time when United quoted $3.01 per barrel to H & W;[8] in Count 3, that Litton violated 15 U.S.C.A. Sec. 13(a), 13(e) and 13(f)[9] by McCollum's handing to officials of H & W the piece of paper with "$11.62" written thereon, thus falsely representing to H & W that plaintiffs had bid $11.62, when in fact they had bid $11.67, that this fraudulent action by Litton "drove the free competitive price of $11.67 or greater, down to $11.61", proximately resulting in plaintiffs suffering serious damages to their business and denying them an opportunity to compete lawfully; in Count 4, that Litton entered into an agreement (apparently with H & W), not to use plaintiff's concrete once H & W responded with the $11.61 bid, which fixed a price on an item in interstate commerce on the condition that H & W concrete would be used to the exclusion of plaintiffs' concrete at a time when plaintiffs and H & W were in heated competition, thus violating 15 U.S.C.A. §14, because the bid award substantially lessened competition and precluded plaintiffs from acquiring valuable business rights, contracts and profits; in Count 5, that Litton secured an agreement from plaintiffs' competitor, H & W, to furnish concrete to Litton's East Bank (Ingalls), a purely private enter-

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[8] In their affirmative Memorandum Brief filed in support of their causes of action, plaintiffs state on page 16 that they "make no argument in support of this Count."

[9] 15 U.S.C.A. Sec. 13(f) provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

prise, at substantially the same low price of $11.61 per cubic yard for concrete at a time when concrete to be used there was being purchased at a substantially greater cost pur cubic yard and thus "tying" the East Bank concrete price to that of the West Bank, substantially restraining competition and damaging plaintiffs.

Each of the three defendants has filed a Motion for Summary Judgment, which will be discussed seriatim.

PARSONS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs charge that Parsons conspired or acted in concert with its co-defendants to eliminate plaintiffs from competition and to create a monopoly in the ready-mix concrete business, and that all defendants, acting in concert, refused to deal with plaintiffs in violation of the Sherman Antitrust Act, 15 U.S.C.A., §§ 1 and 2. In their memoranda briefs, the plaintiffs argue that Parsons' Motion for Summary Judgment should be denied inasmuch as there is sufficient probative evidence from which a jury could find that Parsons acquiesced in the charged unlawful plan or conspiracy. The plaintiffs do not charge this defendant with doing any independent unlawful act which prejudiced or damaged plaintiffs. Therefore, the sole question presented by this motion is whether there is sufficient evidence of record to support the allegation that Parsons unlawfully combined or conspired with the other defendants or acquiesced therein to warrant a full-dress trial against it.

Parsons' Motion for Summary Judgment, which is submitted on the pleadings, the depositions filed herein, and the affidavit of Jack T. Calhoun attached to the motion as "Exhibit 1", is based on two grounds: (1) As a matter of law, it could not be a conspirator; and (2) as a matter of fact, it did not enter into the alleged conspiracy or agreement or acquiesce therein.

Parsons contends that it cannot be a conspirator as a matter of law because of the unique position of its representative and general manager on the project in question, Jack T. Calhoun. To reiterate briefly, Ingalls/Litton employed Parsons for a fixed fee to perform certain services in connection with the construction of the new West Bank shipyard facilities or LAMP. In its agreement with Parsons, Litton/Ingalls reserved to itself complete control over the letting of subcontracts (Exhibit A to Affidavit of Calhoun, Article XXIX, pages 27-29). Not only was this control contemplated by the written agreement but was actually exercised by it as well. Parsons had no authority to award a major subcontract or purchase order without the approval of Litton/Ingalls. Performance of even the ministerial functions of preparing paper work, tabulating data and evaluating bids was not delegated to Parsons alone. Instead, those duties were performed by a "Bid Evaluation Committee", composed of two Litton/Ingalls representatives and Mr. Calhoun. Thus, Parsons argues that any actions or knowledge of its duly authorized representative, Calhoun, were not chargeable to Parsons inasmuch as he was directed in and about the performance of his duties as one member of a three-man committee by management

of Litton/Ingalls. Parsons contends that only two independent business entities can combine or conspire within the meaning of Section 1 of the Sherman Act, *Six Twenty-Nine Productions Co., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966), and that a corporation cannot conspire with its employees and agents, because this would constitute conspiring with itself, which is legally impossible. *Nelson Radio and Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952). This Court need not decide the correctness or validity of this argument because of its disposition of this matter on the factual aspect of Parsons' participation in the alleged conspiracy.

The only independent prejudicial acts charged by the plaintiffs to have resulted from the alleged conspiracy or acquiescence of Parsons are those of its two co-defendants, Litton/Ingalls and United, namely, (1) on the occasion of the third bidding Jack Reese of United met with the plaintiffs and H & W separately and quoted a higher cement price to plaintiffs' joint venture than to the H & W joint venture, and (2) on the occasion of the third bidding, McCollum gave a handwritten note to representatives of the H & W joint venture containing the figure "$11.62", which he at least inferentially represented to H & W to be the price per cubic yard which plaintiffs had bid.

The essential elements of the claimed conspiracy claim are: (1) the existence of a conspiracy as charged; (2) knowledge of a conspiracy and its objectives by an alleged co-conspirator; and (3) his knowing participation or joinder therein. Timberlake, Federal

Treble Damage Antitrust Actions, p. 207. One cannot be an unwitting conspirator; that is, the law of trade conspiracies requires some consciousness of commitment to a common scheme which turns on the understanding of the parties. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al,* 346 U.S. 537, 540-541, 74 S.Ct. 257. 98 L.Ed. 273 (1954); *Klein v. American Luggage Works, Inc.,* 323 F.2d 787, 791 (3rd Cir. 1963); *United States v. Standard Oil Company,* 316 F.2d 884, 890 (7th Cir. 1963). It is therefore necessary to look at all the evidence of record to determine whether there is any genuine issue of fact of Parsons' participation in the charged conspiracy or its knowing acquiescence therein.

The unrefuted and uncontradicted affidavit of Calhoun, together with his deposition testimony, establishes without question that neither he nor anyone else connected with or working for Parsons was aware of Mr. McCollum's handing the piece of paper with "$11.62" written thereon to the representative of the H & W joint venture at any time prior to the award of the purchase order. Calhoun's uncontradicted affidavit also denies any knowledge on his part or on the part of anyone else connected with Parsons that Reese was to quote or quoted a cement price to plaintiffs which was any different than that quoted by him to H & W. On the contrary, he understood that Reese was to meet with the two competing ready-mix bidders to give them an unknown special low price for cement in order that each bidder might reduce his previous bid on the concrete, and he believed that Reese had in fact given the same special low cement price to

each of the two bidding joint venturers. Continuing further, Mr. Calhoun expressly states, without dispute or contradiction in the record, that neither he nor any other person in Parsons' employ or acting for Parsons did anything to disqualify or preclude plaintiffs' joint venture from bidding for or securing the award of the purchase order for the concrete, nor participate in any activity in connection with any of the three rounds of bidding which was designed and intended to cause the plaintiffs' joint venture to be at a disadvantage in the bidding. Actually, the only two positive actions which Mr. Parsons took were, as a member of the bid evaluation committee, to join with the other two members in recommending that the plaintiffs be awarded the ready-mix concrete contract after determining that they were the low bidders on the first two bids.

In *Crummer Co. v. Dupont,* 223 F.2d 238, 245 (5th Cir. 1955), the Court of Appeals, in affirming the District Court's dismissal of two defendants, stated the following which is apropos herein:

> ". . . and no facts are alleged which show or indicate that Gall or Cummer Sons Cypress Company are knowingly or consciously a part of a conspiracy in violation of the Federal Antitrust Laws. Charges as to such conspiracies must be based on substantial and affirmative allegations, and no mere gossamer web of conclusion or inference, as here, trifles light as air, to the suspicious strong as proofs from Holy Writ, will suffice, and we are in no doubt

that the Court did not err in dismissing Gall and Cummer Sons from this suit."

The United States Supreme Court, in affirming a summary judgment in an antitrust case on the ground that the evidence was insufficient to support a charge of conspiracy stated:

> "Essentially all the lower court held in this case was that Rule 56(e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *First*

National Bank v. Cities Service, 391 U.S. 253, 289-290, 88 S.Ct. 1575, 20 L.Ed.2d 569, (1968).

See also *Jones v. Borden Company*, 430 F.2d 568, 573-574 (5th Cir. 1970).

Plaintiffs in this case have conducted extensive discovery, affording them full opportunity to uncover evidence against Parsons if it exists. Looking at the record in the light most favorable to the plaintiffs, including the pleadings, depositions and affidavits filed herein, this Court is unable to discover any refutation or contradiction by plaintiffs of those facts stated in Calhoun's affidavit and deposition. Simply and succinctly stated, there is no significant probative evidence which creates any genuine issue of fact to support the plaintiffs' charges against the defendant, Parsons; therefore, Parsons is entitled to and will be granted a summary judgment on all of the federal antitrust charges.

UNITED CEMENT'S MOTION FOR SUMMARY JUDGMENT

The defendant, United Cement Company, Inc. (United), a Mississippi corporation, is a wholly owned subsidiary of Texas Industries, a Texas corporation, and is a supplier of cement, one of the component parts of concrete. United was incorporated by Texas Industries at the request and urging of Jack M. Reese, its vice president and general manager, who at all pertinent times herein was its sole and only representative in the transactions which form the basis of this

suit. He was acting for United on a non-salary, non-commission basis. Mr. Reese's motivation for having United organized was his long-hoped-for desire to provide a major new industry for northeast Mississippi, creating more jobs for its residents and a better economy through the utilization of its Selma Chalk deposits by manufacturers of cement. United's plant, now under construction near the community of Artesia, will have an initial production capacity of approximately two million barrels of cement per year, which may be expanded to a six million barrel capacity and is anticipated to cost approximately fifteen million dollars.[10]

At the time the first bids for ready-mix concrete were submitted to Litton/Ingalls and Parsons by plaintiff's joint venture and other ready-mix concrete suppliers, H & W,[11] and apparently the plaintiffs, as well as other concrete suppliers — bidders had a cement quotation from United of $3.67 net[12] per barrel, which was the then prevailing market price for cement in the Pascagoula area. This price was United's standing

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[10]See Reese's deposition, Exhibit "A" to United's Motion for Summary Judgment and Reese's supplemental affidavit filed with the Court Sepember 12, 1972.

[11]H & W is referred to as such because R. K. Hollister was a principal and representative in the joint venture of Concrete Products and Supply Company, Inc., and W. C. Weathersby, Jr. was a principal and representative therein of Weathersby Materials, Inc.

[12]By custom and usage in the cement industry a prompt payment discount of twenty cents per barrel is uniformly allowed by cement vendors for payment within ten days. The term "net" on a price quotation indicates the twenty cents prompt payment discount has already been subtracted.

price quotation for cement prior to May 8, the date on which plaintiffs submitted their third and final bid of $11.67 per cubic yard for concrete and on May 9 when, after being handed a slip of paper by McCollum, the vice president and manager of Litton/Ingalls' LAMP project, with the figure "$11.62" written thereon, H & W bid $11.61 per cubic yard for supplying concrete, and was awarded the contract.

Subsequent to the second bids being submitted and rejected, and prior to the May 8, 1968 submission date of the third bids, Mr. Reese prevailed upon Ingalls' chief executive officer in Mississippi, Ellis B. Gardner, Jr., to arrange separate meetings for Reese with H & W's joint venture representatives and plaintiffs' joint venture representatives so that he, on behalf of United, could quote to each group a price per barrel of cement in an effort to obtain a commitment from each to buy from United if awarded the ready-mix concrete supply contract. Gardner complied with Reese's request because of Reese's disclosure of the attempted "rake down" or "kickback" scheme engaged in by employees of Litton/Ingalls.

On May 8, 1968, at his separate meetings with representatives of each of the joint ventures, Reese, acting upon the advice of United's counsel that he could "meet but not beat" the lowest cement price which had been obtained by each joint venture, quoted H & W a cement price of $3.01 net per barrel which he was told by H & W's representatives was the lowest price they had received and was that of Ideal Cement Company of Louisiana. Mr. Reese quoted plaintiffs'

joint venture representatives a price of $3.37 net per barrel, which, with certain adjustments made to compensate for a promised furnishing of a portable ready-mix plant by Louisiana Cement Company, met the lowest cement price which plaintiffs had obtained. Reese refused to "cross reference" and offer to either Litton, Parsons or plaintiffs the $3.01 price which H & W had received from Ideal despite the demands of Gardner and McCollum, because he believed that to do so would change the competitive situation of cement prices which then existed between plaintiffs and H & W by giving plaintiffs a price break or advantage. He was advised by counsel that if he did cross reference the $3.01 price United would be in violation of the antitrust laws by changing the competitive situation then existing between proposed cement suppliers and the two ready-mix concrete bidders.

Since there is a conflict in the evidence, for purposes of this Motion it is assumed to be true that plaintiffs and H & W were told by Litton/Ingalls officials that they would have to utilize United's cement if awarded the ready-mix concrete supply contract. Accordingly, plaintiffs agreed to purchase all of their needed cement from United if they were awarded the contract, and H & W agreed to purchase one-half of its needed cement from United if awarded the ready-mix contract, at the respective prices of $3.37 and $3.01 net per barrel. However, after the H & W joint venture was awarded the ready-mix concrete supply contract under the circumstances previously discussed, it refused to purchase any of its required cement from United despite the fact that it had agreed to purchase

one-half thereof on May 8 at $3.01 net per barrel and subsequently executed a contract to do so at the stated price.[13] H & W purchased all of its cement utilized on this project from Ideal from which it had obtained a $2.92 net per barrel price, apparently on May 8 or May 9, 1968, subsequent to its meeting with Reese of United and prior to its submission of the $11.61 per cubic yard price for supplying ready-mix concrete. Although the separate companies comprising H & W's joint venture did buy a few cars of cement from United after May 8, 1968, those purchases were not related to the project in question, but were made in the ordinary course of business at a price of $3.67 net per barrel, the then prevailing market price for cement in the Pascagoula area.[14]

After United refused plaintiff's request to join them in filing an antitrust action against Litton and Parsons, plaintiffs then filed this suit naming United as a co-defendant with Litton and Parsons.[15] In their second Amended Complaint, in addition to charging all of the defendants with violation of the Mississippi antitrust laws and common law fraud and estoppel, the plaintiffs allege in Counts 1, 4 and 5 of Paragraph XIV Sherman Antitrust Law violations consisting of conspiracy, agreements in restraint of trade and refusal to deal, and also charge the defendants with Clayton and Robinson-Patman Act violations in Counts 1 and

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[13]See the previous discussion herein of United's suit against H & W and the voluntary dismissal thereof with prejudice.

[14]See affidavits of R. K. Hollister and W. C. Weathersby, Jr., Exhibits "B" and "C" to United's Motion for Summary Judgment.

[15]See deposition of Reese, pp. 57-58.

2 of Paragraph XV consisting of price discriminations in violation of 15 U.S.C.A. §§ 13(a), (e) and (f), and discrimination by furnishing "services and facilities" on disproportionate terms in violation of 15 U.S.C.A. §13(e).

United has moved for a summary judgment pursuant to Rule 56, F.R.Civ.P. based on the pleadings, affidavits of Jack M. Reese, R. K. Hollister, Jr. and W. C. Weathersby, Jr., Exhibits A. B. and C to its Motion for Summary Judgment and the supplemental affidavit of Reese dated September 8, 1972, as well as all depositions on file in this cause. It is United's position that there is an absence of significant probative evidence to support the charges against it, and thus no genuine issues as to any material facts which would support a recovery by the plaintiffs. Plaintiffs' second Amended Complaint makes three related factual charges against United: (1) that on May, 1968, United's vice president and general manager, Jack T. Reese, in bad faith and as part of the alleged conspiracy against plaintiffs and for the purpose of giving the H & W joint venture a cement price break and competitive advantage against plaintiffs in bidding for the ready-mix concrete contract, quoted a lower net price per barrel of cement to H & W than to plaintiffs; (2) that United, acting through Reese, and Litton, acting through Ellis B. Gardner, Jr., its chief executive officer in Mississippi, made a "deal" whereby Gardner would see to it that the ready-mix concrete supplier bought his cement from United in exchange for Reese's permitting Rust Engineering Company, an affiliate and wholly owned subsidiary of the Litton

conglomerate, to build a cement manufacturing plant for United at Artesia, in North Mississippi; and (3) that United had knowledge of and consented to Litton/Ingalls' "pegging, depressing and stabilizing" the price of ready-mix concrete in Pascagoula by misrepresenting to H & W on May 9, 1968 that plaintiffs had bid per cubic yard for ready-mix concrete $11.62 the day before, when in fact they had bid $11.67, in violation of the Sherman Antitrust Act, 15 U.S.C.A. §§ 1 and 2.[16] These factual allegations will be treated inversely.

There is no genuine material issue of fact to support plaintiffs' charge that McCollum's handing the piece of paper with "$11.62" written thereon to H & W's representatives on May 9, 1968 was done "with the knowledge and consent of United". This assertion is specifically and categorically denied by Reese in paragraph 10 of his affidavit attached as Exhibit A to United's Motion for Summary Judgment and is not contradicted or refuted in any way by the plaintiffs, who have filed no counteraffidavits or supporting affidavits herein, but who rely upon the depositions filed in this cause, none of which refute United's denial.

The "Rust Engineering deal' 'is alleged by the plaintiffs as a motive for Litton/Ingalls permitting United to quote cement prices to both of the competing ready-mix concrete bidders and the alleged requirement that these bidders, H & W or plaintiff, be required to pur-

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[16]Plaintiffs' ore tenus motion to amend Count 2 of paragraph 14 in order to allege this knowledge on the part of United by changing the word "without" to "with" was granted during the arguments on these motions.

chase their cement component from United in the event that one was awarded the contract to supply ready-mix concrete for the project in question. It is charged that Rust Engineering was a wholly owned subsidiary of Litton and that a "deal" was made by Ellis Gardner for Litton and Jack Reese for United that if United's cement was used by the successful concrete bidder that United would give Rust Engineering a "fair shot" at building United's proposed cement manufacturing plant in Northeast Mississippi.

This assertion is specifically denied in the affidavit and deposition of Reese and the depositions of Gardner and McCollum. These denials are not disputed or contradicted by any evidence of record. In Paragraph 11 of his affidavit attached as Exhibit "A" to United's Motion for Summary Judgment, Reese denies the existence of any such deal, calling it "a figment of plaintiffs' imagination ... and wholly and completely false...". Even assuming that there was an agreement that if United was permitted to quote cement prices to the two competing ready-mix concrete bidders in exchange for its agreement to permit Rust Engineering to bid on the construction of United's proposed plant, such a promise to "permit a bid to be made" rather than to be given the contract, would not, in this Court's opinion, constitute a violation of the antitrust laws. However, the alleged "deal" is denied without contradiction or dispute.[17]

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[17]Rust competed for both the construction contract in question awarded to Parsons and the sand compaction contract, neither of which was awarded to Litton. See Gardner's deposition pp. 34-35.

In their two briefs filed with this Court, plaintiffs have seemingly abandoned their asserted "Rust conspiracy", and instead, apparently now assert that a "possible motive" for United and Litton to conspire against plaintiffs was to enable one J. R. Scribner to sell a concrete processing plant to the H & W joint venture.[18] In further support of United's Motion for Summary Judgment, Reese states at paragraph 4 of his affidavit:

> "I have now been advised in plaintiffs' brief in opposition to United's motion for summary judgment, plaintiffs now accuse me of conspiring against plaintiffs in order to help J. R.

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[18]See page 6 of the plaintiffs' Brief in Support of Their Cause of Action, and pages 10, 12, 18 and 22 of plaintiffs' Brief in Opposition to the Defendants' Motions for Summary Judgment in support of this alleged "Scribner conspiracy" which is not charged in any of their pleadings. Plaintiffs call the Court's attention to page 35-37 of Weathersby's deposition and page 5 of Reese's deposition. Weathersby's deposition testimony confirms the fact that the H & W joint venture bought their concrete plant and front end loader for the Litton projects in question from Scribner's company, and that Scribner was at that time a member of the Mississippi A & I Board, but further asserts, without contradicion, that H & W had on several occasions previously purchased equipment from Scribner's company, including Weathersby's purchase of his individual equipment from Scribner when he first went into business in 1962. Reese's deposition reflects that he had no business affiliation with Scribner, that he had been a competitor of Scribner when he had been in the construction machinery industry before going with United, that Scribner was a stockholder in the company known as Better Roads, Inc., a corporation formed by Reese to raise money to develop the Selma Chalk deposits in Northeast Mississippi prior to the time that Reese went with United, and that most of the stockholders of Better Roads were people connected with the construction industry. See Reese deposition, pp. 4-5, 67, 70.

Scribner sell a ready mix plant to Hollister-Weathersby. At no time did I do anything whatsoever to help Mr. Scribner sell any equipment to Hollister or Weathersby or to any other person seeking contracts on the Litton project at Pascagoula. At no time did I or any other person acting for United conspire, plot or agree with Scribner or Litton or Parsons or Hollister-Weathersby or anyone else to do anything whatsoever to benefit Scribner or to alter the competitive position between plaintiffs and Hollister-Weathersby."

Plaintiffs' "Scribner conspiracy" argument is completely unsupported by any significant probative evidence and furthermore is refuted without contradiction by the above affidavit. Thus, there is no genuine issue of material fact to warrant submission of this "afterthought" argument to a jury.

The last, and apparently principal thrust of the plaintiffs' attack against United, is their charge that United violated §§1 and 2 of the Sherman Antitrust Act and the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. §§13(a) and 13(e), "by conspiring with Litton and Parsons and acting pursuant to such conspiracy or otherwise in quoting in bad faith on May 8, 1968 a cement price to the H & W joint venture of $3.01 net per barrel and quoting to plaintiffs a higher price of $3.37 net per barrel", which allegedly gave the H & W venture a cement price break and competitive advantage against plaintiff in bidding for the ready-mix concrete supply contract.

The affidavits of Reese, Hollister, and Weathersby, Exhibits A, B and C, respectively, to United's Motion for Summary Judgment, as well as all of the depositions filed herein and relied upon by all of the parties in support of and in opposition to the defendants' motions for summary judgment established the following uncontradicted and undisputed facts.[19]

At the time of the first bidding on this ready-mix concrete supply contract on Litton/Ingalls LAMP shipyard (West Bank Shipyard), United had quoted a cement price to the H & W joint venture and apparently to the plaintiffs and other bidders, of $3.67 net per barrel, which was the prevailing Pascagoula market price of cement. H & W had received a low bid for cement from Ideal Cement Company of $3.01 net per barrel, and plaintiffs' low cement bidder was Louisiana Cement which bid $3.47 net per barrel plus the use of the ready-mix concrete plant and bonding assistance (although they had informed Litton/Ingalls that Louisiana Cement's low bid to them was $3.53 net per barrel).

As previously stated, plaintiffs were the low bidders in the first and second biddings but were not awarded the contract by Litton/Ingalls which had specifically reserved the right to reject any and all bids. A third round of bidding was ordered by McCollum of Litton/Ingalls to be submitted on May 8, 1968. Shortly prior

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[19] If any factual question is in dispute, this Court will so indicate and will consider the plaintiffs' version thereof to be true for purposes of discussing and deciding the motions for summary judgment.

to May 8 is when Ellis Gardner instructed McCollum to permit Reese of United to meet separately with the plaintiffs' and H & W's representatives to quote to each a "special low cement price" (a) in return for a past favor of Reese in disclosing to Litton's top management a "rake down" or "kickback" attempted by some of its employees in connection with the awarding of the cement contract for the new shipyard and (b) in accordance with the "Mississippi preference provision" in the contract between the State of Mississippi and Litton.

At these two separate meetings, acting pursuant to the advice of counsel, Reese offered to each of the concrete bidders, H & W and plaintiffs, a cement net price per barrel equal to but not lower than the lowest price which each had at that time received from Ideal and Louisiana Cement Companies, respectively, namely, $3.01 per barrel to H & W and $3.37 net per barrel to plaintiffs.[20] For the purpose of these motions, it is assumed to be true that pursuant to the insistance of Litton/Ingalls, plaintiffs felt compelled to and did agree to purchase at the above prices all of their needed cement from United if they were awarded the concrete supply contract, and H & W agreed to purchase one-half of their needed cement from United if they were awarded the contract.

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[20]It was agreed between H & W's representative and Reese that the ten cent reduction per barrel would compensate for the use of the ready-mix concrete plant and assistance offered by Louisiana Cement so as to equalize the bids of United and Louisiana.

It is established by the undisputed affidavits of Hollister and Weathersby that despite the above agreement between H & W and United, pursuant to which a contract was subsequently executed, H & W did not purchase any cement from United for the project in question, but rather, purchased all of its needed cement for the job from Ideal, a competitor of United, which had given H & W a $2.92 net per barrel price of cement prior to the time that H & W submitted its low bid of $11.61 per cubic yard of ready-mixed concrete on May 9, 1968. Plaintiffs had bid $11.67 per cubic yard of concrete on May 8.

Although United is charged in Count 2 of Paragraph XV of the complaint with having violated 15 U.S.C.A., §13(e), which prohibits any person from discriminating in favor of one purchaser against another or others of a commodity bought for resale by contracting to furnish or furnishing or contributing to the furnishing of any "services or facilities" on disproportionate terms, United is not alleged by the plaintiffs to have furnished any "services or facilities." Therefore, there is no basis in law or in fact for this charged violation. See *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3rd Cir. 1939). However, this Court's subsequent consideration and disposition of the alleged 13(a) violation by United is equally applicable to this 13(e) charge.

The remaining antitrust violation by United charged by the plaintiffs is contained in Counts 1 and 2 of Paragraph XV of their second Amended Complaint which

charge a violation of 15 U.S.C.A., 13(a), which provides, in pertinent part:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce...where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." ...

The foregoing statutory provision must be read in light of 15 U.S.C.A., §15, which authorizes private treble damage antitrust actions:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor..."

United contends that it is entitled to a summary judgment with reference to plaintiffs' 13(a) charge because the evidence of record shows without contradiction or dispute that there is no substantial evidence of record to support any one of the following jurisdictional prerequisites to a successful maintenance of a 13(a) viola-

tion, the absence of any of which is fatal, namely: (1) that plaintiffs were not actual purchasers of cement from United; (2) plaintiffs did not allege nor prove that there were two sales made by United to at least two different purchasers; (3) there were no actual sales made by United in interstate commerce; and (4) that the asserted price differential of cement quoted by United to plaintiffs and H & W did not proximately injure the plaintiffs in their business or property, as required by 15 U.S.C.A., §15.

In the alternative, United contends that even assuming arguendo that factual questions exist with reference to all of the foregoing matters, the undisputed and uncontradicted evidence of record supports its contention that it is entitled to a summary judgment because the evidence shows without dispute that United's Reese acted in good faith and pursuant to the advice of counsel in quoting to plaintiffs and H & W the lowest price, but not a lesser price, than that received by each from other cement suppliers, within the meaning of 15 U.S.C.A., §13(b), (§2 of the Act) which establishes a complete defense to a 13(a) action reads in pertinent part:

> "(b) . . . Nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

In every private treble damage antitrust suit under the Robinson-Patman Act, the plaintiff must establish (1) that the challenged conduct of the defendant violates the statute and (2) that this illegal activity actually injures the plaintiff's business or property. See Rowe, Price Discrimination of Robinson-Patman Act, §16.14, p. 526. The United States Supreme Court has recognized the foregoing principle in *F.T.C. v. Anheuser-Busch*, 363 U.S. 536, 4 L.Ed.2d 1385, 80 S.Ct. 1267 (1960), stating that price differentials constitute but one element of a 13(a) violation, and that a successful plaintiff must also establish a causal connection between the price discrimination differential and consequent injury to a person's business or property. In *American Oil Company v. F.T.C.*, 325 F.2d 101, 104 (7th Cir. 1963), *cert. den.* 377 U.S. 954 (1964), the Court held:

> "... it is essential to the establishment of the violation here charged that there be a causal connection between the price discrimination to the favored customers and the factor relied upon as evidencing an actual or reasonably probable substantial lessening of ability to compete on the part of the unfavored customers."

The cases which recognize the essential element of "proximate cause" are legion. See e.g. *Salerno v. American League*, 429 F.2d 1003, 1004 (2d Cir. 1970); *SCM Corp. v. R.C.A.*, 407 F.2d 166, 171 (2d Cir. 1969); *cert. den.* 395 U.S. 943 (1969); *Borden Company v. F. T.C.*, 381 F.2d 175 (5th Cir. 1967); *Martin v. Phillips*

Petroleum Company, 365 F.2d 629, 631 (5th Cir. 1966); *Tri-Valley Packing Ass'n v. F.T.C.*, 329 F.2d 694, 703 (9th Cir. 1964).

Therefore, in view of the foregoing authorities, it is necessary for this Court to determine whether there is any substantial evidence of record to create a genuine fact issue of proximate cause of injury to the plaintiffs' business or property as a result of any price differential or discrimination on the part of United in giving the two different cement prices to plaintiffs and their competitors, H & W, on or about May 8, 1968. We think not.

At the time that Reese of United met separately with the representatives of plaintiffs and H & W on May 8, 1968, the plaintiffs had received from Louisiana Cement a net price per barrel of cement of $3.47 and H & W had received a $3.01 net price per barrel of cement from Ideal Cement. Thus, H & W had a competitive price advantage of cement, which was only one of the elements of ready-mix concrete supply bids. Pursuant to the advice of counsel, Mr. Reese offered to each of the competing concrete bidders the same price which each had received from its lowest cement supply bidder. It is therefore undisputed that the prices offered by United through Reese did not change the competitive situation which then existed between plaintiffs and H & W with respect to cement prices and could not have proximately caused plaintiffs' failure to receive the ready-mix award from Litton/Parsons because United's cement price bid did not assist H & W in lowering its quoted bid per cubic yard of

concrete. (See affidavit of Reese, Hollister and Weathersby, Exhibits A, B and C to United's motion for summary judgment.)

Plaintiffs' failure to obtain an equal or lower cement price in open market competition with H & W cannot possibly be attributable to any actions or inactions of United. As a matter of fact, it is important to note that Ernest Applewhite, the president of W & A (now Scranton), testified in his deposition at pp. 39-40:

> "Q. All right. Between the time that you submitted your first bid, Bid No. 1, and the time that Mr. Jack Reese submitted you his quote referred to on Exhibit 9, between those two times did you receive any quotes from any other company other than Louisiana Cement?
>
> "A. No. When we put our original bid in we went in with Louisiana Cement . . . and we — we stayed with Louisiana.
>
> "Q. So, you did not solicit any quotes from any other competitors?
>
> "A. No. We frankly told all the other people that we had submitted our bid and asked them for their best bid before the original bid, and then afterwards *we did not care to talk to anybody else.*" (Emphasis supplied).

Applewhite further testified at pp. 223-224 of his deposition that at the time that this suit was filed and up until the time that his deposition was taken he did not

know what price H & W had from cement suppliers, including the $3.01 net per barrel price from Ideal.

Actually, it is established without dispute that the only reason that H & W bid $11.61 per cubic yard of ready-mix concrete on May 9, 1968 and was thus awarded the contract was because they believed that they had to offer a price below $11.62 per cubic yard in order to receive the award, in view of the "$11.62" figure written on the piece of paper handed to their representatives by McCollum of Litton/Ingalls. At that time H & W had the benefit of meeting competition cement price quotation from Ideal of $2.92 per net barrel of $.9 net per barrel below the price bid by United. (See paragraphs 2 of the affidavits of Hollister and Weathersby, Exhibits B and C to United's Motion for Summary Judgment).

In their Memorandum Brief in Opposition to the Defendants' Motions for Summary Judgment at page 28, the plaintiffs seem to concede the absence of any resulting injury to their business or property by United's quoting two different prices per barrel of cement to plaintiffs and H & W by virtue of the following statement:

> "... In the final analysis, considering the alleged conspiracy as a whole, it would not have mattered what was bid by your complainants, inasmuch as fraudulent intention of Litton to fix prices transcended the disadvantage the Complainants were put to by the actions of United. The actions of United were simply to

try to give Hollister and Weathersby an advantage which would allow them to legitimately outbid Complainants. *When this did not work,* Litton by and through its vice president, eliminated Complainants, and in so doing, depressed and fixed a price of ready-mix concrete" (Emphasis supplied).

Regardless of whether the foregoing language amounts to a concession on the part of the plaintiffs that the alleged price differential of cement quoted by United to plaintiffs and H & W was not the proximate cause of any injury or damages to plaintiffs' business or property, it is clear to this Court that there is no evidence of record which would support the essential "proximate cause" requirement or prerequisite of 15 U.S.C.A., §15, and thus the defendant, United, is entitled to a summary judgment against plaintiffs with reference to the charged 13(a) violation.

Although this Court need not further discuss this charged violation in view of its above conclusion, nevertheless, we feel that the parties and the Appellate Court, in the event of appeal, are entitled to our views and conclusions with respect to the remaining contentions of United in support of its Motion for Summary Judgment on the 13(a) charge.

United contends that plaintiffs were not actual purchasers of cement from it and therefore had no standing to maintain this 13(a) cause of action. In *Klein v. Lionel Corporation,* 237 F.2d 13, 14-15 (3rd Cir. 1956), the Court held:

"The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination. In Shaw's, Inc. v. Wilson-Jones Co., 3 Cir., 1939, 105 F.2d 331, 333, we stated: 'The discrimination in price referred to must be practiced "between different purchasers". Therefore at least two purchases must have taken place. The term purchasers means simply one who purchases, a buyer, a vendee.' Klein did purchase Lionel products, but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein therefore can claim no protection under the Act as a direct purchaser.

"The construction put on the term 'purchaser' in Section 2(a) of the Clayton Act must also be placed on that term in Section 3 of the Robinson-Patman Act. These sections are parts of the same law and must be construed harmoniously. The court below properly placed such a construction on Section 3 and construed competitors as meaning 'competing purchasers from the same seller.' . . . Thus Klein has no basis of recover under Section 3. . . ."

The undisputed evidence in this case, including Reese's affidavit (Exhibit A to United's motion for summary judgment), shows that plaintiffs made no purchase of cement from United and that their verbal

agreement to purchase from United was contingent upon their being awarded the ready-mix contract by Litton/Parsons, which had reserved the right to reject any and all bids. Actually, United did not sell any cement to H & W for the project in question although H & W agreed and later contracted to purchase one-half of its cement requirement from United in the event that it was awarded the contract; however, it refused to honor that agreement, resulting in a suit for specific performance, as previously stated, which was subsequently dismissed with prejudice without compromise or consideration by United.

In support of their argument that they have standing to sue United under Section 13(a), the plaintiffs cite and rely on the language found in *American Can Co. v. Bruce's Juices*, 187 F.2d 919, 924 (5th Cir. 1951), *reh. den.*, 190 F.2d 73, *cert. dism.*, 342 U.S. 875, 72 S.Ct. 165, 96 L.Ed. 657 (1951), in which the Fifth Circuit held that the defendant was guilty of unlawful discrimination in granting unjustified quantity price discounts in sales of cans to the plaintiffs' larger competitors, a runway allowance to a particular competitor, and an unjustified and secret lower price on a particular type of cans to another competitor, stating:

> "There is substantial evidence in the record to support the findings as to the discriminatory practices by defendant in connection with the sale of the 3.12 Iscan. At practically the same time defendant was refusing to sell plaintiff the 3.12 Iscan manufactured at Baltimore with freight equalized to Tampa, in ac-

> cordance with its long established freight pricing policy, it was selling the same can to Morgan Packing Company at the desired low price with freight equalized to Morgan's plant at Austin, Indiana. It was not shown that any of defendant's customers except plaintiff were ever required to pay freight on a shipment of the 3.12 Iscan. Moreover, plaintiff was not bound to purchase the 3.12 Iscan upon such terms in order to attain the status of a competing purchaser under the Act, as its failure to do so was directly attributable to defendant's own discriminatory practice."

On the contrary, the defendant, United, relies on many cases which embrace the language and ruling in *Shaw's, Inc. v. Wilson-Jones Co., supra,* in which it is stated:

> "Therefore at least two purchases must have taken place. The term purchaser means one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase. . . ."

In *Package Closure Corp. v. Sealright Co.,* 141 F.2d 972, 979-980 (2d Cir. 1944), the Court affirmed a District Court's refusal to equate mere offers to discriminate with actual price discrimination. *A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corporation,* 81

F.Supp. 890 (D. Mass. 1949), involved an action brought pursuant to the statute in question. The plaintiff alleged that after the defendant agreed to sell it 218,000 gallons of lacquer in the event plaintiff was the successful bidder under a proposal calling for bids issued by the purchasing agent of the State of New Hampshire, thereafter, unknown to plaintiff, the defendant submitted a bid on the same proposal at a lower price and was subsequently awarded the contract. In granting the defendant's motion to dismiss the action for failure to state a claim upon which relief could be granted, the District Court stated at p. 892:

> "It is clear that there is an allegation that the prices asked by the defendant from the two different prospective buyers is not the same. But Sec. 13(a) deals only with price discrimination between *purchasers* (Emphasis by the Court). Here there is only one purchaser, the State of New Hampshire. It is not enough that a prospective purchaser, the plaintiff, would have had to pay a higher price if it did buy. There must be actual sales at two different prices to two different actual buyers (cases cited omitted). Sec. 13(a) on the other hand, does not require price discrimination in actual sales but also expressly includes discrimination in *contracts to sell* (Emphasis by the Court). But this section is limited to cases where a price in one part of the United States is lower than the price exacted by the seller in other parts of the United States. That does

> not apply to the situation here set forth, for there is here only one lot of lacquer which was to be delivered to the same warehouse whether sold directly to the state or sold to plaintiff for resale to the state."

In the *A. J. Goodman* case, the Court further held that the plaintiff failed to prove any injury proximately caused by the defendant's alleged violation of the anti-trust laws inasmuch as the State of New Hampshire reserved the right to reject all bids, as did Litton/Ingalls and Parsons in the case sub judice; and further, that it was far from certain that the state would have awarded the contract to the plaintiff. The court also stated that there would be no violation of 13(a) if the defendant sold to the state at a price equal to the lowest price at which any of its competitors would supply lacquer to the plaintiff, and that in either case defendant's price to the state could be equal to the price plaintiff paid, and hence less than the price at which plaintiff could offer to sell to the state and still make any profit on the transaction; the contract would already be lost to plaintiff, and the fact that defendant lowered his price still further so that it was either discriminatory or unreasonably low in itself, could add nothing to the injury. 81 F.Supp. at p. 893.

In *Aluminum Co. of America v. Tandet*, 235 F.Supp. 111 (D. Conn. 1964), the United States District Court was faced with the problem of the apparent conflict of authorities. *Tandet* involved an action for alleged breach of contract to purchase aluminum products at prices in effect at the time of shipment in which the

defendant counterclaimed based on alleged price discrimination provisions of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13(a). The plaintiff and counterclaimant moved for a judgment on the pleadings. The District Court held that the defendant, a Connecticut resident who allegedly had entered into a written contract with the plaintiff, a Pennsylvania corporation, to purchase certain aluminum products at plaintiff's prices in effect at the time of shipment and who thereafter submitted a purchase order for aluminum products, qualified as a "purchaser" within the provisions of the Act, and was not a mere "offeree", and thus had the status to sue for claimed price discrimination although there actually was no sale made. In denying the defendant's motion to dismiss the second counterclaim, the Court, after discussing the positions of the parties who each relied upon the above apparently conflicting authorities, which supported its contentions, stated:

> "After a study of all the pertinent cases, the Court finds the solution to the issue, consistent with the authorities relied upon by both parties, lies between their respective positions.
>
> "Prior to the execution of a formal writing, businessmen bargain in the realm of credit proposals, quotation of prices, offers and counter-offers, and their words and actions have little legal effect. Once, however, the terms and conditions of an agreement are settled and the contract document drafted and signed, particular rights, obligations, benefits

and liabilities accrue which the courts recognize as binding and enforceable. In the instant case, Alcoa and Tandet were parties to a contract for sale of specified goods. They were no longer in the categories of an 'offeror' or an 'offeree'; they became the 'seller' and the 'buyer'. The transaction on paper was complete; legal relations became operative. The incidence of delivery and payment would affect only the type and kind of remedies an aggrieved party would have in the event of a breach of contract by the other party, but in no other way was their legal status as a seller and a buyer diluted. Submission of the purchase order by Tandet in November, 1961 was not an attempt to enter into a contract but must be regarded as an act done pursuant to an existing contract.

"Applying these concepts to the legal principles enunciated in the cases cited by Alcoa, Tandet qualifies as a purchaser and not a mere offeree; there was a purchase of specific goods, not an offer to sell unidentifiable products; and there was a sale with price, conditions and terms agreed on, not an offer waiting for an acceptance. This is not a 'refusal to sell' case, for Alcoa actually signed a contract for sale of goods to Tandet. By its own contract action in this Court, Alcoa recognizes itself as an aggrieved seller seeking remedy against a breaching buyer.

"On the other hand, the Court does not read Bruce's Juices, supra, to authorize any prospective buyer or offeree in the open market to be a beneficiary under the Act. A review of the several cases involving the Bruce's Juices Company and the American Can Company reveals that these companies had long established contractual relations. There is little question there were written contracts and perhaps binding oral agreement between the companies that evolved from a course of dealings over a period of years....

"The only case that might appear inconsistent with this holding is A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp., 81 F.Supp. 890 (D. Mass. 1949), which the parties cite as a contract for sale case. *However, the Court interprets the agreement in that case to be a 'contract to make a contract' for sale. An essential condition precedent, namely, the acceptance of plaintiff's bid by the State of New Hampshire, was necessary to make the writing operative as an enforceable contract for sale. The State of New Hampshire did not accept the bid submitted by the plaintiff in that case and, hence, there was no contract.*" (Emphasis supplied). 235 F.Supp. at 114-115.

The Court agrees with the *Tandet* Court's analysis of the A. J. *Goodman* case, namely, that the agreement constituted a "contract to make a contract" for sale, and that there was no contract in view of the

fact that an essential condition precedent, namely, the acceptance of plaintiff's bid by the State of New Hampshire, was necessary to make the writing operative as an enforceable contract for sale. In the case sub judice, Litton/Ingalls and Parsons reserved the right to reject any and all bids, and thus, had the unqualified right to reject the bid of plaintiffs as it did on two previous occasions. Plaintiffs argue in their opposition brief that Litton/Ingalls and Parsons had no authority to reserve the right to reject any and all bids in view of § 8968-11, Mississippi Code 1942, Rec., which was in effect in May, 1968, and which was Section 7 of Chapter 393, Laws of 1960, amending Section 11, Chapter 473, Laws of 1958, which created the State Board of Public Contractors. That section was part of Code Title 33, Chapter 5, which related to Public Contracts as a plain reading of that statute clearly shows.[21] This

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[21]"Section 7. That section 11, chapter 473, laws of 1958, be and the same is hereby amended to read as follows:
'Section 11. It shall be unlawful for any person who does not hold a certificate of responsibility issued under this act, or this act as amended, or a similar certificate issued by another state recognizing such certificate issued by the State of Mississippi to submit a bid, enter into a contract, or otherwise engage in or continue in this state in the business of a public contractor, as defined in this act. Any person violating this section by submitting a bid for the construction of public works or public projects without having a certificate of responsibility issued under this act, as and if hereinbefore required, at the time of the submission of such bid shall be guilty of a misdemeanor.' "All bids submitted for public works or public projects where said bid is in excess of twenty-five thousand dollars ($25,000.00) shall contain on the outside or exterior of the envelope or container of such bid the contractor's current certificate number and no bid shall be opened or considered unless such contractor's current certificate number appears on the outside or exterior of said envelope or

Court agrees with the defendant, United, that the statute merely governs the awarding of contracts on public works or projects by state governmental agencies to prime contractors on a public bid basis, and neither that section nor any judicial decision of the State of Mississippi imposes a public bid requirement on a prime contractor such as Litton in relation to its selection of its materialmen and subcontractors. Although the LAMP Shipyard was a BAWI (Balance Agriculture With Industry) project, whereby the State, through the A & I (Agricultural and Industrial) Board leased the shipyard to Litton and contracted with Litton to construct it as prime contractor (Mississippi Code Annotated, Section 67564-01, et seq. as amended), Section 7564-13 contains a public bid waiver and pro-

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container or unless there appears a statement on the outside or exterior of such envelope or container to the effect that the bid enclosed therewith did not exceed twenty-five thousand dollars ($25,000.00).

"In the letting of public contracts, preference shall be given to resident contractors. If a nonresident contractor shall be the lowest and best bidder, but the bid of a resident contractor shall come within five per cent (5%) of the bid of such nonresident contractor, and such resident contractor shall be willing to accept such contract at the same price bid by the nonresident contractor, then the contract shall be awarded to the resident contractor, provided, however, that he shall nevertheless be required to make bond, as provided by law. If there should be more than one bid by resident contractors which shall come within five per cent (5%) of the bid of a nonresident contractor as provided herein, then each of such resident contractors shall be given the option of accepting such contract at the same price bid by the nonresident contractor, beginning with the resident contractor submitting the lowest bid. For the purposes of this section, a foreign corporation which has qualified to do business in this state in the manner required by law, prior to the advertising of bids, shall be considered to be a resident contractor."

vides that the A & I Board may "negotiate and enter into contracts with responsible lessees (Litton) for construction of facilities by lessee" without any requirement of public bidding.[22] Litton/Ingalls and Parsons therefore clearly had the right to reject any and all bids as well as the authority under the above contract to negotiate the selection of materialmen to supply the ready-mix concrete job. There was no contract requiring the purchase of concrete from the plaintiffs as low bidders on the first two bids and therefore they were not "actual purchasers" from United, which was a prerequisite to their maintaining this 13(a) action.

In view of the foregoing findings and conclusions it is not necessary to discuss in detail whether there is any material issue of fact concerning whether there were "two actual purchasers" of cement from United. Suffice it to say that the well established requirement in 15 U.S.C.A. §13(a) cases is that the complaining party must allege and prove that there were two sales made by the same seller to at least two different purchasers. *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 7-9 (5th Cir. 1969), *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 924 (5th Cir. 1964); *A. J. Goodman*

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[22]A copy of the construction contract executed by the A & I Board and Litton is attached to plaintiffs' original Complaint herein as Exhibit "B". It does not require Litton to acquire its materials and subcontracts by public bid, but rather, Article II provides "Ingalls shall have the right to employ such qualified subcontractors, as Ingalls shall deem advisable or necessary to assist in the performance of the work." Article XI of the contract specifies "Ingalls shall give notice by publication of its intent to let or negotiate any subcontract so that all Mississippi contractors qualified under Mississippi law will have the opportunity of submitting a quotation thereon."

& Son, Inc. v. United Lacquer Mfg. Corporation, supra. Although this Court is of the opinion that despite the fact H & W did not actually purchase cement from United as it had contracted and promised to do if it were awarded the ready-mix concrete contract, nevertheless, by virtue of the foregoing authorities, that it was "an actual purchaser" within the meaning of the Act, but that it was the only one, and thus there were not two actual sales by United to two different buyers.

United contends that it is entitled to summary judgment on the "good faith meaning of competition" defense of 15 U.S.C.A. §13(b) (§2(b) of the Act) if it does not prevail on any of its foregoing contentions. Section 2(b) provides in part:

> "(b) ... Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Section 2(b) provides a complete defense to an otherwise violation of Section 13(a), by permitting a seller to act in good faith to meet an equally low price of a competitor. *Federal Trade Commission v. Sun Oil Company,* 371 U.S. 505, 516-517, 9 L.Ed.2d 466-477, 83 S.Ct. 358 (1963); *Jones v. Borden,* supra, at 572-574.

It is undisputed in the record that at the time Reese separately met with the representative groups of plaintiffs and H & W, H & W had a competitive advantage over plaintiffs with reference to cement prices which it had obtained from Ideal Cement Company; that the plaintiffs had received its low bid, which was higher than Ideal's price from Louisiana Cement Company, the supplier with which they decided to "stay" throughout the entire bidding process; that Reese was permitted to meet with both of the ready-mix bidders and in good faith, on advice of counsel and to avoid changing an existing competitive situation between plaintiffs and H & W, quoted a net price per barrel of cement equal to the low net price which had been obtained from cement suppliers in open competition bidding; that Reese refused to cross-reference to plaintiffs the lower price which H & W had obtained from Ideal at that time, and which would have altered the competitive situation drastically to the disadvantage of H & W; and that he did nothing which changed or altered the competitive positions of plaintiffs and H & W with respect to cement prices.

In their Memorandum Brief in Opposition to Defendants' Motions for Summary Judgment, the plaintiffs state the following at page 29:

> "He (Reese) states in his affidavit that he was acting under advice of Counsel. Counsel of whom Mr. Reese is speaking represented a cement company. In regard to a possible lawsuit among cement companies, the advice

> given by his Counsel would have been correct. . . ."

Again, at page 31 of their defensive brief, plaintiffs concede:

> ". . . . It is submitted that Counsel for United is mistaken inasmuch as Reese would have altered the competitive situation as between *cement suppliers.* (Emphasis by brief writer).
>
> *Then, Louisiana Cement would have had a cause of action in Anti-Trust Law against United Cement.* . . ." (Emphasis supplied).

Thus, the plaintiffs recognize and concede that had Reese cross-referenced United's $3.01 net per barrel cement price to H & W, which merely met the low price which H & W had from Ideal, it would have drastically changed the competitive situation which then existed, inasmuch as plaintiffs' low bid which they had obtained from Louisiana Cement Company with which they had decided to "stay" was considerably higher. In this Court's opinion this would have constituted a violation of 15 U.S.C.A. §13(a) and subjected plaintiffs to a treble damage suit by Louisiana Cement and H & W. United is thus charged with violating the various antitrust statutes which its representative, Reese, acting on advice of counsel, attempted in good faith to avoid.

This Court is thus of the opinion that the uncontradicted facts of record and the well established law

support United's contention that it is entitled to a summary judgment based on this statutory defense afforded by 15 U.S.C.A. §13(b).

For the foregoing reasons, and each of them, this Court is of the opinion that United is entitled to a summary judgment with reference to all of the Paragraph XV Clayton, Robinson-Patman Act charged violations.

United is charged in Counts 1, 4 and 5 of Paragraph XIV of the Complaint with various violations of the Sherman Antitrust Act, 15 U.S.C.A. §§ 1 and 2. As previously stated, Count 1 charges the existence of a conspiracy between all of the defendants to create a monopoly in the ready-mix concrete business in the Pascagoula, Mississippi area and otherwise unduly restrain interstate trade, eliminating complainants from free access to the market; Count 4 charges an agreement between Litton and United hereinafter referred to as the "Rust Engineering Agreement", in restraint of interstate trade; and Count 5 charges that all defendants, acting in concert, designated United as a sole source supplier of cement to plaintiffs and their competitors, II & W, at two different prices, which constituted a concerted refusal to deal resulting in the denial to plaintiffs of meaningful access to the market and violation of the prohibitions against price restraints proscribed by the Act.

In view of the Court's above findings and conclusions as well as the following discussion of Litton's entitlement to a summary judgment on the Sherman Antitrust charges, United is also entitled to a sum-

mary judgment on all of its alleged Sherman Anti-Trust violations.

Litton/Ingalls Motion for Summary Judgment

In Paragraph XIV of the Complaint, the plaintiffs charge that the defendant, Litton/Ingalls has violated §§ 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C.A. §§ 1 and 2) by: unlawfully conspiring and/or attempting to conspire with its co-defendants, Parsons and United, to eliminate them from competition in the public bidding, tending to create a monopoly in the ready-mix concrete business in the Pascagoula area and otherwise unduly restraining interstate trade eliminating plaintiffs from free access to the relevant market (Count 1); pegging, depressing and stabilizing the price of ready-mix concrete in the relevant market by misrepresenting, with the knowledge and consent of the other named defendants, to H & W that plaintiffs had submitted a bid per cubic yard of ready-mix concrete in an amount lower than the amount actually bid resulting in a lower overall price of ready-mix concrete for the West Bank project and on Ingalls East Bank Shipyard project than would otherwise have prevailed (Count 2); Litton West Bank and Ingalls East Bank agreeing, expressly or impliedly, to use their monopoly power by virtue of a tying agreement or reciprocal dealing arrangement in order to coerce H & W to furnish concrete to the East Bank yard at the same low price charged for the West Bank or LAMP Shipyard facility, thus placing an undue burden on interstate trade (Count 3); Litton entering into an agreement with United in restraint of interstate trade,

i.e. if United would "consider" permitting Rust Engineering, a subsidiary of Litton, to build United's proposed cement plant in North Mississippi, Litton would offer United a "fair shot" or final opportunity to quote cement prices to the joint venturer concrete bidders (Count 4); all defendants, acting in concert, designating United as a sole source supplier of cement to plaintiffs and their competitors, H & W, and United giving a lower price to H & W than to plaintiffs, which constituted a per se violation of the Sherman Act, constituting a concerted refusal to deal or a boycott against plaintiffs, denying them meaningful access to the market and violating the prohibition against price restraints (Count 5).

In Paragraph XV of the Complaint, plaintiffs charge the defendant, Litton, with violation of various provisions of the Clayton Act as amended by the Robinson-Patman Act, namely: Litton, acting in concert with United, unlawfully discriminated in the prices of United Cement available to plaintiffs and H & W under such conditions as would lead plaintiffs to reasonably believe that they were forced to use United Cement, in violation of 15 U.S.C.A. §13(e), Section 2 of the Clayton Act, and Section 1 of the Robinson-Patman Act (Count 2); fraudulently and deceitfully drove the free competition price of ready-mix concrete down to $11.61 in violation of 15 U.S.C.A. §§ 13(e) and (f) (Count 3); by entering into an agreement, apparently with H & W, not to use plaintiffs' concrete provided H & W responded with a bid lower than $11.62 written on a piece of paper handed to H & W's representatives by Litton's vice president, McCollum, in viola-

tion of 15 U.S.C.A. §14 (Count 4); and reiterating the alleged tying or reciprocal dealing agreement alleged in Count 3 of Paragraph XIV, in violation of 15 U.S.C.A. §14.

Litton's Motion for Summary Judgment with reference to the Clayton, Robinson-Patman Act violations alleged in Counts 2-5 of Par. XV of its complaint will first be discussed. The Robinson-Patman Act is applicable only where the alleged discriminatory transactions take place in interstate commerce, that is, when an action is brought under the Robinson-Patman Act, it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, as distinguished from an action brought under the Sherman Antitrust Act wherein it is sufficient if the transaction complained of, although intrastate in nature, affects interstate commerce. *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, 71 S.Ct. 240, 95 L.Ed. 239 (1951); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir. 1969), *cert. den.* 396 U.S. 901 (1969); *Willard Dairy Corporation v. National Dairy Products Corporation*, 309 F.2d 943 (6th Cir. 1962). In the case sub judice, plaintiffs have sued for treble damages pursuant to 15 U.S.C.A. §15 (§4 of the Clayton Act), complaining of Clayton, Robinson-Patman Act violations in connection with their failure to obtain the ready-mix concrete supply contract. It is neither alleged nor proved that the ready-mix concrete in question was to be shipped in interstate commerce but, to the contrary, the evidence shows that the ready-mix concrete was to be produced within Mississippi near Litton's West Bank shipyard

and delivered there, which is wholly an intrastate transaction. The fact that cement, one of the raw materials to be used in producing the ready-mix concrete was to be shipped in interstate commerce, from either Texas or Louisiana to Mississippi does not satisfy the "in commerce" requirement of the Act. It must be remembered that no supplier of cement is a party plaintiff to this suit, and the different prices of cement given by United to plaintiffs and H & W did not in any way change the competitive position of the ready-mix concrete suppliers, and thus did not proximately cause any injuries to the plaintiffs herein as required by §4 of the Act. Cases supporting the principle that raw materials from which a final saleable product was produced were shipped in interstate commerce did not satisfy the "in commerce" requirement of the Act are *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972) (crude oil which was later refined into gasoline); *Myers v. Shell Oil Company*, 96 F.Supp. 670 (S.D. Cal. 1951). (See, also *Baldwin Hills Building Material Co. v. Fireboard Paper Products Corp.*, 283 F.Supp. 202 (C.D. Cal. 1968). Thus, this Court is of the opinion that it does not have jurisdiction to entertain plaintiffs' suit against Litton for alleged violations of the Clayton Act as amended by the Robinson-Patman Act.

In the event that this Court is in error in its finding of no jurisdiction, there devolves upon it the duty to determine whether there are any genuine issues of material fact with respect to any of the claimed violation by the defendant, Litton, of the provisions of the Clayton Act as amended by the Robinson-Patman Act,

predicated upon the complaint, depositions, and affidavits.

This Court's previous conclusion that there was no substantial conspiracy or agreement between Litton and United concerning the different quotations given by United to the plaintiffs and H & W on the price of cement per barrel is equally applicable to Count 2 which charges unlawful discrimination by Litton. Likewise, this Court's conclusion that the different prices quoted by United to the plaintiffs and H & W was not the proximate cause of H & W's receiving or plaintiffs' not receiving the contract, which is a prerequisite to recovery in a private antitrust action under §15 of 15 U.S.C.A. is also applicable to this charge against Litton. Therefore, the defendant, Litton, is entitled to a summary judgment against the plaintiffs in connection with the alleged discrimination charged in Count 2.

Turning now to Count 5 of Par. XV, which charges Litton with securing from H & W an agreement to furnish concrete to Litton's East Bank shipyard (Ingalls), a purely private enterprise of Litton, at substantially the same price of $11.61 per cubic yard, thus "tying" the East Bank concrete price to that of West Bank, which allegedly "affected" goods in interstate commerce thereby substantially restraining competition and proximately causing damage to plaintiffs in violation of 15 U.S.C.A. §14, which plaintiffs in their briefs state should have been charged as "reciprocal dealing" rather than "tying agreement", this Court is of the opinion that there is no genuine issue of mater-

ial fact which would support a recovery by the plaintiffs against Litton based on this allegation. First, in Antitrust Developments, 1955-1968, a Supplement to the Report of the Attorney General's National Committee to Study the Antitrust Laws, at p. 105, it is stated: "The usual tying arrangement forces a *customer* to take a product he does not want in order to secure one he desires" (Emphasis supplied). Thus, a prohibited tying agreement or arrangement is one designed to proscribe actions of a seller, as distinguished from a buyer, requiring a buyer to purchase a product that he does not desire in order to secure one that he does.

Furthermore, in order to constitute a "tying agreement" in violation of 15 U.S.C.A. §14 (Clayton-Robinson-Patman Act) or 15 U.S.C.A. §1 (Sherman Act) there must be two distinct products involved, i.e., there must be a second distinct product purchased (a tied product) along with a dominant tying product. *Times-Picayune Publishing Company v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); *United States v. Loew's, Inc.*, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); *Northern Pac. Rwy. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *Advance Business Systems & Supply Co. v. SCM Corporation*, 415 F.2d 55, 67 (4th Cir. 1969). Regardless of whether the challenged practice involves Clayton Act commodities, or products (including services) falling within the ambit of the Sherman Act, the tying item and the tied item must be separate and distinct from each other to constitute an illegal tying arrangement. The present case involves only one product, namely, concrete, and thus there is no tying arrangement. The

plaintiffs' reliance upon *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969), and *U.S. v. Jerrold Electronics Corporation*, 187 F.Supp. 545 (E.D. Pa. 1960) is misplaced. Based on these two cases, plaintiffs contend that there were two products, a "contract" to sell concrete to the East Bank at the same low price as was developed for the West Bank and "concrete"; furthermore, that since United is a defendant in this cause, if the time of its sale of cement is regarded as the crucial time of sale, then two distinct products are involved, namely, ready-mix concrete and cement. First, the facts of this case do not support plaintiffs' contention that a "contract" implied or otherwise, was entered into requiring a sale of concrete by H & W to the East Bank at the same price as West Bank. A prohibited "contract" could not come into being between the East and West Bank shipyards because they are merely unincorporated divisions of the same corporation, Litton. In the case sub judice, only one product was the subject of negotiations between Litton and the plaintiffs and that was ready-mix concrete. Thus, there can be no "proscribed tying agreement" which would violate either the Clayton Act as amended by the Robinson-Patman Act or the Sherman Act. Litton therefore is entitled to a summary judgment against plaintiffs with reference to Count 5 of Par. XV relating to violation of 15 U.S.C.A. §14 as well as Count 3 of Par. XIV, alleging violation of 15 U.S.C.A. §1, the Sherman Act.

If the foregoing alleged violations of the Sherman Act and of the Clayton Act as amended by the Robin-

son-Patman Act are charged as "reciprocal dealing" rather than a "tying agreement", the plaintiffs would not be entitled to have this issue of fact presented to the jury, inasmuch as the phrase "reciprocal dealing" refers to the use of buying power to secure an advantage in the sale of one's product, that is, while it may take varied forms, the central core is the use of purchasing power to promote *sales*" (Emphasis supplied). In the case sub judice, Litton said they did not use any purchasing power which it may have possessed to promote sales. Actually, it was not selling, but was buying.

Turning now to the plaintiffs' allegation charging Litton with "refusal to deal", this is not in itself prohibited by §1 of the Sherman Act, *Times-Picayune Publishing Company v. United States, supra.* The unilateral refusal to sell or buy is always permissible except when actual monopoly or specific intent to monopolize exists. *Federal Trade Commission v. Raymond Brothers,* 263 U.S. 565, 573, 44 S.Ct. 162, 68 L.Ed. 443 (1924); *Dahl, Inc. v. Roy Cooper Co.,* 448 F.2d 17 (9th Cir. 1971); *Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911 (5th Cir. 1952), *cert. den.* 345 U.S. 925 (1953). A bilateral refusal is prohibited only where there is concerted action by those who are true competitors. *Times-Picayune Publishing Company v. United States, supra; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213, 71 S.Ct. 259, 95 L.Ed. 219 (1951). Therefore, even if a conspiracy could be shown, neither of the alleged parties thereto are "true competitors" and consequently no such cause of action is stated under 15 U.S.C.A. §1. Since there

is no vertical arrangement, neither can there be a violation of 15 U.S.C.A. §14.

Furthermore, there could be no conspiracy or agreement between unincorporated divisions of a corporation which would constitute a violation of the antitrust laws, because the East Bank and West Bank (LAMP) Shipyards are both unincorporated divisions of Litton Industries. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969); *Deterjet Corp. v. United Aircraft Corp.*, 211 F.Supp. 348, 353-354 (D. Del. 1962).

For the foregoing reasons, the undisputed evidence establishes that there are no genuine issues of material fact which would support plaintiffs' allegations of a "tying agreement" or "reciprocal agreement" or conspiracy between the two Litton divisional operations which would support a recovery by them against Litton for violation of 15 U.S.C.A. §14 charged in Count 5 of Par. XV or 15 U.S.C.A. §1 which is charged in Count 3 of Par. XIV of the second Amended Complaint.

The remaining counts of Par. XV of the amended complaint which charge the defendant, Litton, with violation of the provisions of the Clayton Act as amended by the Robinson-Patman Act, are based upon McCollum's handing a piece of paper to the representatives of H & W, with "$11.62" written thereon on May 9, 1968. Count 3 charges that by fraudulently representing that plaintiffs had paid $11.62 when in fact they had paid $11.67 per cubic yard of ready-mix concrete, "Litton drove the free competitive price of $11.67

or greater down to $11.61 by fraud and deceit in violation of 15 U.S.C.A. §13(f) which proximately caused plaintiffs to suffer serious damage to their business and denied them the rightful chance to compete lawfully." Count 4 charges that this conduct by McCollum constituted an agreement by Litton, apparently with H & W, "not to use plaintiffs' concrete once H & W responded with the $11.61 bid, and that this bid substantially lessened competition and precluded plaintiffs from acquiring valuable business rights, contracts and profits by virtue of the fact that H & W received the award and subsequently acquired profits."

In support of their "fraudulent inducement" allegation of Count 3 charging a violation of §13(f) of the Clayton Act as amended by the Robinson-Patman Act, the plaintiffs principally rely upon *Kroger Co. v. Federal Trade Commission*, 438 F.2d 1372 (6th Cir. 1971), which will be fully discussed herein.

Litton contends that no claim can be stated against it under 15 U.S.C.A. §13(a) and (e) and §14 inasmuch as these sections are directed at *"sellers"* and not *"buyers"* (Emphasis supplied). See Report of the Attorney General's National Committee to Study the Antitrust Laws, infra p. 156 (1955). See, also American Bar Association, Antitrust Developments, 1955-1968, at p. 120 (1968), which reads in part as follows:

> "Apart from the brokerage clause in §2(c), the principal Robinson-Patman provision applicable to buyers is found in §2(f). It prohibits buyers from knowingly inducing or re-

ceiving a discriminatory price which the seller is forbidden to grant under §2(a) of the Act. The Act does not include any provision prohibiting buyers from including or receiving discriminatory allowances or services which sellers are prohibited to grant under §§ 2(d) and (e)... To the same effect, the Clayton Act, §3, forbids any person engaged in commerce to lease or make a sale or contract of sale' of goods or commodities 'for use, consumption, or resale' within the United States or to fix a price or grant a discount on the condition or understanding that lessee or buyer will not use or deal in the goods... of a competitor or competitors of a lessor or seller when the effect ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' "

The prior conclusion of this Court in this opinion that the requirement of "two actual sales" to "different purchasers", a necessary prerequisite for violation of 15 U.S.C.A. §13(a), is lacking, is equally applicable to this subject.

Likewise, § 13(e) prohibits promotional allowances and services not made available or accorded to all competing customers or purchasers on proportionately equal terms and thus has no application to the sale of commodities with which we are involved in the case sub judice, as previously discussed herein.

The previous discussion of § 14 and the conclusion reached by this Court that there could be no violation thereof by Litton under the undisputed facts of this case, is also equally applicable hereto.

It is in this context that the 13(f), or "fraudulent inducement" contention of the plaintiffs and the applicability of the *Kroger* opinion must be considered.

In *Kroger, supra,* the Kroger Company operated a chain of some 1400 retail grocery stores. In 1961 it invited several dairies to submit bids for bottling Kroger labeled milk in an endeavor to explore private label sales in the hope that its own labels would permit it to compete more profitably and effectively with other retail grocery chains. Beatrice, the third largest dairy company in the United States, entered into bidding and during the course thereof Kroger falsely indicated to Beatrice that it had received lower bids from other dairy companies than it actually had and thus induced Beatrice to lower its prices to meet the non-existent prices of other dairy companies. Beatrice acted in good faith and responded to the false lower prices quoted to it by Kroger. The Court held that Kroger could be found in violation of § 13(f) even though Beatrice was absolved from violation of the provisions of 15 U.S.C.A. § 13(a) (§ 2(a) of the Act) based on its § 2(b) defense. The court concluded that Kroger knew or should have known that Beatrice's prices were not cost justified and that the differentials received by Kroger impaired competition because the price advantage afforded a higher profit margin on resale even in the absence of proof that Kroger undersold its rivals.

The price discrimination in *Kroger* occurred because competing retail grocery chains were required to pay more for milk purchased from Beatrice with the result that they realized less profit on resale. Price discrimination in violation of 2(f) did not occur with the false inducement itself, because in the absence of two sales by Beatrice to Kroger and Kroger's competing retail grocery chains, there could be no discrimination in prices, and absent resale by Kroger and its competing resale grocery chains, there could be no injury for there could be no competitive advantage.

This Court agrees with the argument of Litton that the facts in *Kroger* are distinguishable from those in the case sub judice for the following reasons: (1) there was but one sale for use in the case sub judice, as contrasted from two or more sales for resale in *Kroger;* (2) there is no evidence in this action that H & W's bid was not cost justified as was the case with Beatrice's bid given Kroger; actually, the evidence is to the contrary since H & W had a lower cement price than did the plaintiffs herein; (3) in *Kroger,* Beatrice was in violation of § 2(a) except for a § 2(b) defense to the Beatrice sales at higher prices to retail grocery chains competing with Kroger. In the case sub judice there was one sale and thus there was no discrimination in price prohibited by 15 U.S.C.A. § 13. Consequently, Litton could not be guilty of inducing or receiving in violation of § 13(b) (§ 2 of the Act). Additionally, the facts of the case sub judice are materially different than those in *Kroger,* in which there existed a large number of potential purchasers of Kroger's products to whom it could sell at lesser

prices than that charged by its competitors in the retail grocery business, whereas in the case sub judice, we are dealing with the award by Litton, who was not in the ready-mix concrete or cement business, of a single subcontract to H & W to furnish concrete for one construction job. This Court is of the opinion that the complained of conduct is not within the coverage of the Robinson-Patman Act or Sherman Act, particularly in view of the fact that Litton reserved the right to reject any and all bids. Thus, there is no assurance that even if plaintiffs had been the lowest bidder they would have received the contract. See *Goodman & Son v. United Lacquer Mfg. Company, supra.*

Count 4 of Par. XV which charges Litton with agreeing with H & W not to use complainant's concrete once H & W responded with a bid lower than $11.62 per cubic yard is subject to the above conclusion reached by this Court, namely, that although Plaintiffs *may* have a valid common law action for recovery against Litton based on fraudulent inducement and estoppel, nevertheless the evidence does not support the claim that Litton was never guilty of any conduct which violated the Robinson-Patman Act by its actions, albeit possibly unfair, in attempting to secure the lowest possible price for ready-mix concrete which it was attempting to purchase for the construction of its LAMP or West Bank Shipyard.

For the foregoing reasons, this Court is of the opinion that Litton is entitled to a summary judgment against plaintiffs in connection with all of plaintiffs' Par. XV

charges of violation of the Clayton Act as amended by the Robinson-Patman Act.

Finally, it is necessary to determine whether Litton is entitled to a summary judgment against the plaintiffs in connection with plaintiffs' charged violations of the Sherman Antitrust Act contained in the five counts of Par. XIV of the second amended complaint.

As previously stated, this Court has found that the evidence herein does not create any genuine issue of any material fact which would support plaintiffs' charges of violations of the Sherman Act contained in Counts 1 and 3 of Par. XIV of their second Amended Complaint. Therefore, there remains only the question of whether Litton is entitled to a summary judgment in connection with the price fixing allegation of Count 2, the alleged agreement in restraint of interstate trade contained in Count 4 and the alleged refusal to deal as a result of its alleged designation of United Cement as a sole source supplier of cement to plaintiffs and their competitors, H & W, charged in Count 5.

In discussing United's entitlement to a summary judgment, this Court determined that the affidavit and depositions of Jack Reese, Ellis Gardner, and all other evidence of record disclosed without contradiction that there was no agreement entered into between Litton and United which would constitute a violation of §1 of the Sherman Act. This conclusion therefore requires the granting of a summary judgment in favor of Litton with rference to the charged Count 4 viola-

tion. Actually, it is doubtful whether this charge, taken as true, would constitute a violation of § 1 inasmuch as it only alleges that Litton would give United a "fair shot" *or* final opportunity to quote cement prices to each joint venturer if United would "consider" using Rust Engineering, a subsidiary of Litton, in building United's proposed cement plant in Mississippi. Regardless, the undisputed and uncontradicted evidence of record supports Litton's position that it is entitled to a summary judgment on this charged violation.

We feel it apropos to discuss the remaining two counts of Par. XIV of the amended complaint together, that is, Count 2 which charges price fixing and Count 5 which alleges a concerted refusal to deal and designation of United as a sole source supplier of cement to plaintiffs and their competitors, H & W. All of the evidence of record firmly convinces this Court that the actions of Litton were not violative of the Sherman Antitrust Act and that this type conduct on the part of Litton was not intended by the Congress to be the subject of the Sherman Antitrust Law. Although it was the intent of Congress to protect the small businessman who is in competition with large corporations and conglomerates or those with much greater buying power from discriminatory practices, the facts of this case do not bring it within the ambit of the Sherman Antitrust Act. Litton was not in the concrete business and was not competing with anyone therefor; it was not purchasing ready-mix concrete for resale to anyone; it was not interested in paying or depressing or stabilizing or reducing the price of cement in the market except to obtain the lowest possible price available to

it. If it unfairly or through fraudulent conduct deceived plaintiffs' competitor, H & W, into offering a lower price by intimating that plaintiffs had submitted a bid of $11.62 instead of $11.67 per cubic yard, this may properly be the subject of the common law action which is included as a Second Cause of Action in the Complaint, but would not constitute a violation of the Sherman Antitrust Law subjecting Litton to the treble damages penalty.

If a conspiracy in fact could be shown, Litton was not a competitor of any defendant nor of any other supplier of cement or concrete, but was merely trying to obtain the best possible price for concrete rather than attempting to fix the price as proscribed by the federal antitrust laws. It must be remembered that Litton reserved the right to refuse and reject any or all bids, which this Court has held it had the right to do under the law. Plaintiffs were not awarded the contracts in question because they were not the low bidder and not because they were the object of an illegal boycott or because of monopolistic power of Litton. See *Instant Delivery Corp. v. City Stores Co.*, 284 F.Supp. 941 (E.C. Pa. 1967).

Even if United was designated as a sole source supplier by Litton, the price per barrel of cement which it quoted to plaintiffs and H & W were the same low prices that each already had, and did not alter the competitive position of either by changing their cost of cement and thus changing the price of ready-mix concrete.

Also as previously stated in this opinion, Applewhite, the president of W & A Construction Company (now Scranton), testified by deposition that he had definitely decided to "stay with" Louisiana Cement Company in acquiring his needed cement at the price which he had received from them in open bidding. Thus, although Louisiana Cement might have had standing to complain of United being designated as a sole source supplier, plaintiffs do not have such standing since they were not directly or proximately injured by any such designation. Furthermore, the evidence shows without dispute that Litton through its chief executive officer, Gardner, did not conspire with United to give different cement prices to plaintiffs and H & W, but, to the contrary, he insisted that United's Reese cross-reference the $3.01 per barrel quotation for cement which it gave to H & W to the plaintiffs, which Reese refused to do on the advice of counsel.

The plaintiffs' reliance on *Mechanical Contractors Bid Depository v. Christiansen*, 352 F.2d 817 (10th Cir. 1965), *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954), and *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), in support of charged violations of the Sherman Act through "bid-rigging" which it charges that Litton engaged in by furnishing the $11.62 figure to H & W, is misplaced. In these cited cases, the effect on commerce was significant and substantial, as distinguished from the activities complained of in the case sub judice, which were "purely local" or involved the award of a single subcontract for ready-mix concrete to be produced and delivered in Pascagoula, Missis-

sippi. This had no significant effect on the flow of any material in interstate commerce and thus did not meet either the qualitative or quantitative test constituting a violation of the Sherman Act. For this reason, this Court is of the opinion that if mistaken in any of its foregoing conclusions concerning the various separate charges by the plaintiffs of Litton's violations of the Sherman Act, we are of the opinion that this Court does not have jurisdiction of this cause of action under the Sherman Act because the transaction involved and product which was the subject thereof, namely, ready-mix concrete, was not shipped in interstate commerce and did not significantly or unreasonably affect the nation's interstate trade and did not constitute a per se violation of the Sherman Act inasmuch as it did not have a monopolistic tendency to interfere with free competitive marketing.

The *Klor's*[23] Court carefully limited its own reach. It involved a predatory conspiracy with both horizontal and vertical elements directed at a single competitor with the purpose of driving that competitor from the field by foreclosing all sources of supply. The facts of this case do not bring it within the *Klor's* reach. See *Beckman v. Walter Kidde & Company, Inc.*, 316 F.Supp. 1321 (E.D. N.Y. 1970).

The purpose of a summary judgment is to screen out sham issues and to discover whether one side has no real support for its version of the facts; it cannot

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[23]*Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1957).

be defeated by the vague hope that something may turn up at trial. While this Court recognizes the importance of preserving litigants' rights to trial on their claims, nevertheless it is of the opinion that there is no significant probative evidence tending to support the plaintiffs' federal antitrust charges against any of the defendants herein. *First National Bank v. Cities Service*, 391 U.S. 253, 289-290 (1968); *Jones v. Borden, supra*, at pp. 573-574; *Beckman v. Walter Kidde & Company, Inc., supra*, at p. 1324. The parties hereto have had ample opportunity to complete all discovery which they desired, and all of the evidence is of record before this Court, which is constrained to conclude that no genuine issue as to any material fact exists with respect to the claimed violations by any of the defendants of §§ 1 and 2 of the Sherman Act or any of the provisions of the Clayton Act as amended by the Robinson-Patman Act; that predicated on the pleadings, affidavits and depositions, the plaintiffs are not entitled to the luxury of a trial on nonexistent issues, and all of the defendants, including the defendant, Litton, are entitled to summary judgments against the plaintiffs on the federal antitrust charges.

We will not undertake to pass upon the merits of the common law claims of the plaintiffs which charge fraud and estoppel in Pars. XX-XXII "as and for a second cause of action", and the Court declines to exercise pendent jurisdiction over these causes of action inasmuch as there is no diversity of citizenship between the plaintiff, Scranton, and the defendant, United, both being Mississippi corporations domiciled therein.

Therefore, summary judgments in favor of all of the defendants on the federal antitrust charges against them and an order of dismissal without prejudice with reference to plantiffs' state anti-trust and common law claims, shall be presented to this Court, approved as to form by the attorneys for all parties, within the time and manner prescribed by the rules.

/s/ WALTER L. NIXON, JR.
UNITED STATES DISTRICT JUDGF

Biloxi, Mississippi
February 16, 1973

APPENDIX "B"

SCRANTON CONSTRUCTION COMPANY, INC., and Clegg Concrete, Inc., Plaintiffs-Appellants,

versus

LITTON INDUSTRIES LEASING CORPORATION et al., Defendants-Appellees.

No. 73-1980.

United States Court of Appeals,
Fifth Circuit.

May 31, 1974.

Appeal from the United States District Court for the Southern District of Mississippi.

Before COLEMAN, CLARK and GEE, Circuit Judges.

GEE, Circuit Judge:

Plaintiffs-appellants' federal antitrust suit, with joined state-law claims, was terminated by summary judgment. We affirm.

Plaintiffs are Mississippi and Louisiana corporations which sought, as joint venturers, the ready-mix concrete subcontract involved in the construction of a shipyard in Pascagoula, Mississippi.

In 1967, Defendant Litton Systems, Inc. (Litton), by its wholly owned subsidiary,[1] agreed with the State of Mississippi to build a large[2] shipyard at Pascagoula for the state. Litton hired Defendant Ralph M. Parsons, Inc. (Parsons), a Nevada corporation qualified in Mississippi, to be a sort of general construction superintendent[3] at a fixed fee, but reserved to Litton the award and method of award of the ready-mix subcontract and all others of financial significance. Litton's contract with Mississippi and Parsons' contract with Litton both contained "Buy Mississippi" preference clauses.

In due course, Parsons solicited quotes for 300,000 yards of ready-mix concrete, specifically reserving the rights to reject any and all bids and to furnish to the winner cement, sand and aggregate at its discretion. The bid evaluation committee, composed of two Litton men and one from Parsons, found plaintiffs' bid lowest and best and recommended its acceptance. Litton, however, exercised its prerogative and required rebids by plaintiffs and the second lowest bidder, a venture composed of two Mississippi concerns. These produced a second low bid by plaintiffs and a second recommendation by the committee that plaintiffs receive the work. Litton, however, again rejected all bids and

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[1]Ingalls Shipbuilding Corporation.

[2]Financed by $130,000,000 of Mississippi State Bonds.

[3]Though denominated "general contractor or subcontractor." In the course of this appeal, Parsons was dismissed as a defendant. Since it is undisputed that Litton had reserved to itself all power over the award of the contract in question, no room exists for a contention of conspiracy with Parsons affecting the award.

thickened the plot by introducing to it the third and last defendant, United Cement Company, Inc. (United).

United, the wholly owned Mississippi subsidiary of a Texas corporation, was the child of its General Manager Reese's dream of developing the vast Selma Chalk deposits in Northeast Mississippi for portland cement production. Reese had long coveted the subcontract in question and had supported the shipyard project and taken other appropriate measures with this in mind. Among his recommendations for the job was one of peculiar quality: he had earned Litton's gratitude by refusing to submit to a bid-rigging and kickback scheme operating among Litton's lower echelons and had courageously exposed it to top management and aided in its extirpation.[4] Consistent with Mississippi preference, out of gratitude for Reese's commendable action, and pursuant to an understanding that Reese would be given a "fair shot" at the cement contract,[5] Litton arranged a meeting between Reese and the two low bidders so that Reese could quote each "a special low price" for cement to enable him to reduce his bid on the ready-mix. This was, and was known to Reese and Litton beforehand to be, a farce: Reese merely quoted to each bidder the cement price[6]

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[4]It seems regrettable, though irrelevant, that all Mr. Reese's vision and fortitude in the premises produced for his concern was a lawsuit.

[5]In exchange for Reese's promise that a Litton subsidiary would have a "fair shot" at building United's plant. In the event, both "fair shots" were clean misses.

[6]Plaintiffs were quoting $3.37 net per barrel as the cement price on which their bid was based, their competition $3.01. Neither knew the other's price.

which he had already stated in his last bid, having been warned by his counsel that to do otherwise would be to alter their competitive status and violate the antitrust laws. Litton had pressed Reese to "cross-reference" the prices, but Reese refused to do so, fearing suit. Plaintiffs assert that this rather curious procedure established United as a "sole supplier," and we so assume for summary judgment purposes. At any rate, after the Reese conference plaintiffs agreed to use only United's cement if awarded the contract, and the competitor agreed to use half of it.[7]

In the ensuing third round of bids, plaintiffs quoted $11.67 per cubic yard. But the next day Litton handed the competitor a slip of paper on which was written "$11.62." The competitor took this to be plaintiffs' bid, bid $11.61, and received the contract. A later, lower bid by plaintiffs was rejected by Litton, and this suit followed.

Discovery in the case has been extensive and exhaustive; and it, together with unrefuted affidavits, establishes further particular facts which we will notice at appropriate points. We note at the outset that we are not called upon to, and do not, consider or pass judgment on Litton's business ethics. Our concern is with other issues. Two defendants — Litton and United — remain actively before us, plaintiffs having dismissed Parsons and conceded that another, Litton Industries Leasing Corporation was erroneously sued.

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[7] In the end the competitor found a better price and bought none of it.

Plaintiff's Sherman Act and Clayton, Robinson-Patman Act claims against Litton and United proceed upon four actions and inferences of conspiracy based upon them: (1) the repeated rebidding required by Litton, (2) designation of United by Litton as the "sole source" of cement, (3) United's offer of different prices to the two competing bidders, and (4) the inducement of an artificially low bid from plaintiffs' competitor by causing it to believe plaintiffs' bid was $11.62 when in fact it was $11.67. Before taking up the merits of these claims, we consider subject-matter jurisdiction.

Jurisdiction

[1,2] The court below concluded, in its careful and wide-ranging opinion, that it lacked jurisdiction under both the Clayton, Robinson-Patman Act and the Sherman Act. Bearing in mind the deservedly high mortality rate of summary dispositions of such litigation as this,[8] and the disfavor with which such dispositions are viewed,[9] we conclude that plaintiffs show arguable jurisdiction under the Sherman Act, stemming from the magnitude of the intrastate ready-mix sale and its close nexus to the construction of the shipyard, a massive instrumentality of interstate and foreign commerce — a showing sufficient, at any rate, to make us unwilling to dispose of those claims on jurisdictional

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[8]Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1145 (5th Cir. 1973), cert. denied, ——— U.S. ———, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973).

[9]Cf. Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969) (dismissed on pleadings).

grounds. As to Clayton, Robinson-Patman, however, plaintiffs clearly fall short.

[3-5] They properly concede that their competitor's only sale of concrete here involved was entirely intrastate;[10] though ingredients which had travelled interstate, such as cement, were involved, " ... all the interstate ingredients were mixed together within the confines of Pascagoula, Mississippi, and delivered to Litton there." This is fatal. Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir. 1969), cert. denied 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969). Nor does the interstate movement of mere ingredients suffice. Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972), cert. denied, 408 U.S. 928, 92 S.Ct. 2494, 33 L.Ed.2d 341 (1972). And though we recognize that the Supreme Court has granted certiorari in a second-line injury case where our Brethren of the Ninth Circuit have dispensed with the requirement of interstate sale on the ground that sales of a commodity to be used in constructing an instrumentality of interstate commerce were involved,[11] and that thus a new deliverance in this area may soon come, we are not disposed to depart from our recent decision, supported by well-nigh universal precedent, that inter-

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[10]Indeed, any conceivable sale of *ready-mix* by plaintiffs or their competitors would have been such; both proposed to manufacture in Mississippi and deliver to Litton there.

[11]In re Western Liquid Asphalt Cases, 487 F.2d 202 (9th Cir. 1973) cert. granted ____ U.S. ____, 94 S.Ct. 1586, ____ L.Ed.2d ____ (1974). That Court distinguishes our *Littlejohn* opinion, infra, on the ground that we were not there required to consider such a nexus.

state sales must be involved for jurisdiction to attach under these acts. Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973); Cf. Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), cert. denied, ____ U.S. ____, 94 S.Ct. 899, 39 L.Ed.2d 102 (1974). We therefore pretermit further discussion of the Clayton, Robinson-Patman Act claims.

The Sherman Act Claims

[6] We have searched the record in vain for evidence supporting plaintiffs' allegations of a combination or conspiracy against them between Litton and anyone in the area of plaintiffs' claims. Proof of this is, of course, essential to plaintiffs' case under §1 of the Sherman Act and to its conspiracy claims under §2. First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); Crummer Co. v. Du Pont, 223 F.2d 238 (5th Cir. 1955), cert. denied, 350 U.S. 848, 76 S.Ct. 85, 100 L.Ed. 755 (1955). Facing defendants' sworn challenge to the existence of such a conspiracy, it was up to plaintiffs to produce significant probative evidence — by affidavit or deposition — demonstrating that a genuine issue of fact existed as to this element of the complaint, if summary judgment was to be avoided. First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 289-290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). The evidence indicates conduct by Litton, albeit pursued in a roughshod way, consistent with its own business purposes,[12] not

[12]See Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279, 1287 (5th Cir. 1972), cert. denied, 409 U.S. 845, 93 S.Ct. 48, 34 L.Ed.2d 86 (1972).

in concert with but rather at the expense of plaintiffs competitor and at cross purposes with United.

[7,8] Taking up in order the four Litton actions of which plaintiffs primarily complain,[13] the repeated rebidding and terminal negotiations required by Litton were entirely consistent with a legitimate purpose to obtain the best price and were not improper under Mississippi law.[14] At all times, Litton and Parsons specifically reserved the right to reject any and all bids. Plaintiffs' assertion that its initial and subsequent low bids gave it some right of which it was illegally deprived, and that Litton's actions in requiring rebids and in dickering with the bidders were conspiracy, are therefore ill-founded.

[9] As for the designation of United as "sole source" of cement, and its quotation of a lower price to plaintiffs' competitor than to plaintiffs, these do not evidence a conspiracy against plaintiffs, whatever else they may indicate. United did not originate the price differential, it took it as it found it. So far from conspiring with Litton to maintain it, the record indicates strenuous efforts by Litton to persuade United's Reese to quote the same price to both ready-mix bidders and his refusal to do so on advice of his counsel that such an action would interfere with the competitive situation and lay United open to some such suit as this.

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[13]Set out at the end of our factual statement above.

[14]Section 8968-11, Mississippi Code, upon which plaintiffs rely, appears to be limited to prime contractors' bids to state agencies, as the court below held, and does not prohibit Litton's reservations of rights on bids submitted to it by subcontractors.

There is no evidence here of a combination to price-disadvantage plaintiffs, rather the contrary. Nor do plaintiffs allege or offer proof that United's advent as "sole supplier" froze the cement quotation to plaintiffs. For all that appears in the record, United would have been pleased to meet any lower price which plaintiffs could have confronted it with — down, at least, to that which it had quoted the competitor. No bias against plaintiffs appears here; indeed, as Reese averred, United would have preferred plaintiffs get the contract so as to sell the same amount of cement at a large profit. Thus, however unsavory the "sole supplier" posture which United assumed may be thought, it was not plaintiffs against whom it militated but plaintiffs' cement supplier, not a party here.

[10] Finally, the "divulging" to plaintiffs' competitor by Litton of the spurious bid of $11.62 was plainly unilateral action by Litton, however questionable, and we seek in vain for the presence or action of any co-conspirator in such conduct. The record is clear that United did not even know of it, nor was it conduct which could conceivably have advanced the scheme to put United forward as sole source or supplier. And were we disposed to see the gulled competitor as a conspirator — the beneficiary, though overreached, of some understanding with Litton to shut plaintiffs out — there are no allegations to this effect.

[11] In short, the evidence reveals nothing which by any method short of Procrustes' can be made to demonstrate a *conspiracy* to injure plaintiffs. The Sherman Act is neither a lowest-responsible-bidder

statute nor a panacea for all business affronts which seem to fit nowhere else. Parmelee Transportation Co. v. Keeshin, 186 F.Supp. 533 (N.D. Ill. 1960), aff'd, 292 F.2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, 82 S.Ct. 376, 7 L.Ed.2d 340 (1961).

[12, 13] Insofar as plaintiffs' complaints assert an attempted monopolizing of the ready-mix market by means of the various maneuvers noted above in the course of a one-time sale for use to Litton, proofs are entirely lacking of the relevant market, its condition, or of a monopoly or dangerous probability of one. See, *e. g.*, Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969). And having correctly disposed of the federal claims, the court below properly dismissed plaintiffs' pendent state antitrust and common-law claims without prejudice, for adjudication by an appropriate state tribunal. United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Affirmed.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1973

No. 73-1980

D. C. Docket No. CA-4166

SCRANTON CONSTRUCTION COMPANY, INC., and CLEGG CONCRETE, INC.,
Plaintiffs-Appellants,

versus

LITTON INDUSTRIES LEASING CORPORATION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before Coleman, Clark and Gee, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: May 31, 1974

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130

June 25, 1974

TO ALL COUNSEL OF RECORD

No. 73-1980
Re: SCRANTON CONSTRUCTION COMPANY, INC., ET AL V. LITTON INDUSTRIES LEASING CORPORATION, ET AL

Gentlemen:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK
/s/ ANNE G. PARENT
Deputy Clerk

cc: Mr. Norman Breland
Mr. Boyce Holleman
Messers. William T. Jones
John M. Grower
Mr. W. Ramsey McKinney
Mr. Karl Wiesenburg
Mr. Charles E. Foster

APPENDIX "E"

SUPREME COURT OF THE UNITED STATES

No. 73-1012

GULF OIL CORPORATION, ET AL.,
Petitioners,

versus

COPP PAVING COMPANY, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed March 25, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to question 1(a), (b) and (c) presented in the petition which reads as follows:

> "1. With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that state, does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law
>
> (a) Of the anti-discrimination clause of the Robinson-Patman Act that the discriminatory sale be by a 'person engaged in commerce, in the course of such commerce,' that 'either or

any of the purchases involved * * * [be] in commerce,' and that the 'effect *** may be substantially to lessen competition or tend to create a monopoly in any line of commerce?'

(b) Of Section 3 of the Clayton Act that the tying conduct be that of a 'person engaged in commerce, in the course of such commerce' and that 'the effect *** may be to substantially lessen competition or tend to create a monopoly in any line of commerce?'

(c) Of Section 7 of the Clayton Act that the acquisition by a 'corporation engaged in commerce' be of a corporation 'engaged also in commerce,' and that 'the effect *** may be substantially to lessen competition, or tend to create a monopoly,' where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?"

April fourth, 1974
/s/ ILLEGIBLE
Deputy